Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

ENTERPRISE VI,

Petitioner,

v.

BOONE COUNTY FISCAL COURT, BOONE COUNTY PLANNING COMMISSION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

PETITION FOR A WRIT OF CERTIORARI

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March 1995

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QUESTIONS PRESENTED

I. Does the interpretation and enforcement of a zoning ordinance which fails to set forth standards whereby a landowner may look at the zoning plan and reasonably anticipate the use to which the property may be put violate Due Process, Equal Protection and/or 42 U.S.C. §1983 as an improper vesting of absolute and arbitrary power?

II. Does a *First English*[1] taking occur when a local zoning ordinance on its face and as enforced allows no use for a specific tract of land until the owner submits a development plan which requires a standardless review process by the local legislative body?

III. When years pass after a use application is improvidently denied, will declaring an ordinance unconstitutional be a sufficient remedy in light of substantial loss of investment-backed expectations?

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[1] See *First English Evangelical Church v. County of Los Angeles*, 482 U.S. 304 (1987).

LIST OF PARTIES

Enterprise VI, a Kentucky General Partnership consisting of Albert J. Vesper III (also acting as Guardian of the Estate of Alicia Vesper), Ronald J. Vesper, Paul J. Vesper, Stephen J. Vesper, and Dennis J. Vesper ("Enterprise VI"), is the Petitioner.[2]

Erpenbeck Commercial Enterprises, Inc. ("Erpenbeck"), also a Movant below in a consolidated action, has elected to file a separate petition for writ of certiorari as provided by Supreme Court Rule 12.2.[3]

The Boone County Fiscal Court[4] ("Fiscal Court") and the Boone County Planning and Zoning Commission[5] ("Planning Commission") are the Respondents.

On the questions presented, the aforementioned parties and the parties to the proceedings below are identical.

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[2] Enterprise VI is the owner of 264 acres of undeveloped land ("tract") which is located in Boone County, Kentucky. The tract is adjoined on one side by the Greater Cincinnati-Northern Kentucky International Airport and a four-lane state highway on the other.

[3] Erpenbeck is a commercial builder who contracted with Enterprise VI to develop the tract for use as a retail shopping center.

[4] The Fiscal Court is the chief body with legislative authority in the county where the tract is located.

[5] The Planning Commission is the body authorized to propose plans for adoption by the Fiscal Court relating to the controlled future growth, preservation and development in the county where the tract is located, and is also designated as the first of the two governmental bodies to hear proposals for use permits.

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No. _____

In The

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October Term, 1994

ENTERPRISE VI,

Petitioner,

v.

BOONE COUNTY FISCAL COURT, BOONE COUNTY PLANNING COMMISSION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions this Court to grant a writ of certiorari to the Supreme Court of Kentucky in this case.

OPINIONS BELOW

The Opinion of the Boone Circuit Court granting Defendants summary judgment and the Opinion of the Kentucky Court of Appeals denying petition for rehearing and affirming the judgment of the Boone Circuit Court are unreported. Those Opinions, as well as the

Order of the Supreme Court of Kentucky denying discretionary review are reprinted in the Appendix and appear at pages 15a, 1a, and 31a respectively.

JURISDICTION

Petitioner has been made to sustain substantial financial losses as a result of the interpretation and enforcement of Respondents' zoning ordinance – an ordinance which Petitioner contends, is transgressive of a landowner's federal constitutional and statutory right to receive compensation whenever a regulation goes "too far" and leaves a landowner no use for its land. The Supreme Court of Kentucky entered its judgment on December 14, 1994 (App., *infra*, 1a). This Petition has been filed within 90 days after the entry of said judgment. This Court has jurisdiction to review the final judgment on a petition for certiorari pursuant to 28 U.S.C. §1257. Therefore, the jurisdiction of this Court is properly invoked.

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT

> "No person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

FOURTEENTH AMENDMENT

"Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . "

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws shall be liable to the party injured and in action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. §1988 provides:

"In any action . . . to enforce . . . 42 U.S.C. §1983, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

A. Statement of the Facts

Adoption of a Zoning Ordinance.

In 1986, the Planning Commission researched and presented a zoning ordinance to the Fiscal Court which

changed the zoning of Enterprise VI's tract from Industrial 1 ("I-1") to Commercial 2 ("C-2")/Planned Development ("P.D.") zone. P.D. zoning was created as an "alternate amendment process" to allow for mixed uses and increased densities within an underlying zone.[6] Thus, the C-2/P.D. which allowed for a base line C-2/ Commercial Development became subject to a layer of regulatory review which applied to any and all uses that might be proposed. This proposed zoning ordinance was ultimately adopted by the Fiscal Court.

The Review Process was Admittedly Standardless and Arbitrary.

The record below contains the deposition of the "designated deponent" of the Respondent questioned regarding the interpretation and enforcement of the zoning ordinance. Respondent testified that the P.D. zone overlay permitted no use for property until approval was sought and obtained at its discretion.

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[6] Specifically, §1504 of the zoning ordinance provides that: "The Planning Commission shall require that a Concept Development Plan be submitted for property located in a Planned Development zone. The Concept Development Plan may be filed to the Planning Commission by the *owner(s), owner by contract (option) or lessee of property* for which the planned development is proposed. . . . " (Emphasis supplied).

In this case, even though the zoning ordinance specifically required the *property owner* to request the P.D. "overlay" zone to be placed on its property, it was the *Respondents* that placed the overlay zoning on Enterprise VI's property without the application process required by their own zoning ordinance.

The Respondent was asked:

Q. Now if a person wants to use a piece of property that is zoned P.D., are there any principally permitted uses in the Boone County planning ordinance, excuse me, in the Boone County ordinance?

A. No.

* * *

Q. Okay, a piece of property in Boone County is zoned C-2 P.D. under the current zoning ordinance therefore you would agree with the statement, has no principally permitted uses without further action from the Boone Fiscal Court?

A. Yes.

(Respondent Boone County Dep., App., *infra*, at 55a-62a.)

Loss of Investment-Backed Expectations.

In 1989, Enterprise VI and Erpenbeck entered a purchase contract in which Erpenbeck was to sell a portion of the tract to HyperShoppes, Inc. ("Hyper") for a Biggs department store. Erpenbeck contracted to buy the 264 acre tract from Enterprise VI for approximately $27,000 per acre. At the same time, Erpenbeck entered into a contract to sell 43 acres of the tract to Hyper who planned to construct a Biggs Department Store on the site at a price of $120,000 per acre.

Erpenbeck initially sought ministerial approval of the plan pursuant to Article 14 because, in the absence of the P.D. overlay, the uses proposed were entirely consistent

and allowed as a matter of right in the C-2 zone. However, ministerial approval was denied as a result of the County Official Policy and interpretation of Article 15.

For purposes of mitigating its damages and exhausting any available administrative remedies, Erpenbeck filed an application with the Planning Commission on November 1, 1989, for concept development plan approval of the Biggs project under the C-2/P.D. zone. The Planning Commission recommended rejection on January 3, 1990. The reasons for rejection included potential traffic problems and incompatibility with the 1986 Comprehensive Plan. On January 11, 1990, Hyper terminated its contract with Erpenbeck, citing the Planning Commission's denial as reason for termination.[7]

The Effect of P.D. Zoning.

Enterprise VI was required to undergo a legislative review process before any underlying development would occur, even though its development plan was consistent with the C-2 underlying zone. Enterprise VI has maintained in all the courts below that a property owner with a P.D. overlay in Boone County has no permitted use for his property unless he receives legislative approval from the Fiscal Court. *The effect of such a requirement meant that Enterprise VI was required to obtain an amendment to the law in order to use its property.*

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[7] Without being exercised, Erpenbeck's option to purchase Enterprise VI's property expired on February 1, 1990. The Fiscal Court decided on February 6, 1990, to uphold the Planning Commission's decision and formally deny Erpenbeck's application for the Biggs project.

B. Procedural History

This case presents a post-enforcement facial challenge to a zoning ordinance on the ground that it violates the federal constitution and federal law. Petitioners brought an action in the Boone Circuit Court maintaining that Respondents' interpretation of their own zoning ordinance is: (i) inconsistent with a fair reading of Article 15 of the ordinance; (ii) inconsistent with state zoning law; (iii) results in violation of federal and state constitutional law provisions by taking of property without just compensation as well as denial of due process; and (iv) caused monetary losses to Petitioners. (App., *infra*, 38a-54a).

The trial court thereafter dismissed all of Petitioners federal and state constitutional claims, federal and state statutory claims and common law tort actions by granting summary judgment in favor of Respondents. The Court of Appeals sustained on a split decision. For his dissent, Special Court of Appeals Judge Vance, found and concluded:

> "I respectfully dissent from the majority opinion which affirms the Summary Judgment entered by the trial court. I would hold that the Commercial 2 ("C-2") Planned Development ("PD") zone violates the constitution of Kentucky, because it contains no standards from which it can be ascertained whether or not a proposed development is entitled to approval or disapproval, and thus, approval or disapproval of any proposed development is left entirely to the arbitrary discretion of the members of the Fiscal Court." (App., *infra*, 13a).

After motions to vacate were filed, the trial court entered a final order from which appeal has been taken. The Kentucky Court of Appeals affirmed the decision of the trial court without a rehearing. The Supreme Court of Kentucky subsequently denied discretionary review.

REASONS FOR GRANTING THE PETITION

I. Conflict exists between the states.

As evidenced by the instant case, Kentucky allows standardless review of use permits. Other state courts are declaring that development conditions which require standardless review violate the federal constitution as interpreted by this Court. See *Anderson v. City of Issaquah*, 70 Wash. App. 64, 851 P.2d 744, 751 (1993) (citing *Connally v. General Const. Co.*, 269 U.S. 385, 391); see also *City of Buford v. Ward*, 212 Ga. App. 752, 443 S.E.2d 279 (1994). Hence, the supreme law of the land is not being applied uniformly in the states.

II. Standardless zoning goes "too far".

Under the standardless zoning ordinance proposed and adopted by Respondents, no permitted use existed for Enterprise VI's land until it sought and obtained an amendment to the law. In the years since *Euclid*, "zoning has become an accepted necessity in our increasingly urbanized society." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 74, *reh. denied*, 429 U.S. 873 (1976). Indeed, Petitioner will readily concede that the Respondents have the authority to interpret and enforce zoning ordinances

and that those ordinances are, generally to be afforded a presumption of validity when attacked. *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978). However, when the exercise of the municipality's authority conflicts with liberties protected by the Constitution and federal law, the usual presumption of validity must fail. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

No doubt our cities should be made beautiful and orderly to the highest extent permissible under the law. Unfortunate for Kentucky landowners, however, the degree of communal control has progressed to standardless zoning.[8] Thus, the Court now has an opportunity to decide whether the exercise of standardless zoning abrogates protections afforded by the Fifth and Fourteenth Amendments, as well as federal law.

III. The failure to provide a landowner with advance notice whereby he can look at the zoning plan and reasonably anticipate the use to which the property may be put is a vesting of absolute and arbitrary power.

No permitted use for Enterprise VI's land existed until it sought further legislative approval. Yet, discretionary zoning is the antithesis of land use control. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978),

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[8] This Court authorized the briefing of essentially the same issue in the *PFZ Properties* case, but eventually dismissed the issuance of certiorari as being improvidently granted. *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, *cert. granted in part*, ___ U.S. ___, 112 S. Ct. 414, *cert. dismissed*, 503 U.S. 257, 112 S. Ct. 1151 (1992).

reh. denied, 439 U.S. 883 (1978). Governmental regulation must be accompanied by methods consistent with due process with its touchstone being the protection of the individual against arbitrary action of government; the guarantee of due process demands that a zoning regulation bear substantial relation to the purpose of the control. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

This Court declared in its landmark zoning case that an ordinance which is arbitrary, unreasonable and without substantial relation to the public health, safety, morals or general welfare shall be deemed unconstitutional. *Euclid v. Amber Realty Co.*, 272 U.S. 365, 388 (1926). Regardless of the deference normally accorded zoning practices by the courts, the Constitution does not tolerate arbitrary and unreasoned legal requirements.

In the case at bench, no standards existed for the P.D. overlay zoning. Respondents even testified that the P.D. zone overlay in question permitted no use of property until approval was sought and obtained from it in a highly discretionary procedure. Here, Respondents were able to convince the courts below that as long as they could fashion some reason that advanced a state interest for denying a use permit, it may reject the argument that the ordinance on its face and as applied was arbitrary.[9] However, such an approach ignores the fact that the ordinance was standardless from the start. "After-the-

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[9] In order to reject Petitioners' argument, the Kentucky Court of Appeals reasoned that: "The record reflects that a lot of careful thought and analysis went into the Planning Commission's recommendations about the Biggs proposal." (App., *infra*, at 7a).

fact" and discretionary zoning subverts the very tenets of land use control and due process. An ordinance which requires a landowner to ask permission prior to using its land, especially where the proposed use is entirely consistent with the underlying zone, amounts to nothing more than a "Mother May I?" situation where the zoners and planners may arbitrarily and capriciously deny the request so long as they can devise some "reason" to support their finding. Under such a scheme, a landowner clearly has no notice whereby it can look at a zoning plan and reasonably anticipate the use to which its property may be put.

The ordinance in question must fail because "men of common intelligence must necessarily guess at its meaning". See *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). The "void for vagueness" doctrine requires fair warning and non-discriminary enforcement. Vague laws provide opportunity for arbitrary and discriminatory enforcement since those who apply the rules have no clear and explicit standards to guide them. Thus, due process requires that restrictions made by zoning regulation not be unreasonable, arbitrary, or capricious. Hence, the ordinance, as interpreted and applied, was admittedly arbitrary, and therefore patently offensive to the guarantees of due process.

IV. Allowing no use for a specific tract of land until an owner submits a development plan subject to a standardless review process is a compensable regulatory taking and goes "too far".

The Fifth Amendment provides, in relevant part, that "private property [shall not] be taken for public use, without just compensation." Although this provision is generally not construed to prohibit the government from taking private property for governmental purposes, it places a specific condition on the exercise of that power. It is well-settled that the cost of governmental interference with property rights which works a taking necessarily implicates the "constitutional obligation to pay just compensation." *Armstrong v. United States*, 364 U.S. 40 (1960). It is axiomatic that the Just Compensation Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.*

On deciding the issue of when regulations go "too far", this Court has previously reasoned that "temporary takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *cf. San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 657 (1981) (Justice Brennan stating for his dissent that "[n]othing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable").

Petitioner has been made to sustain substantial financial losses caused by the interpretation and enforcement

of Respondent's zoning ordinance. A standardless ordinance which permits no use until a legislative body grants its approval should be declared by this Court to constitute a temporary regulatory taking and compensable under the Fifth Amendment as an example of regulation that goes "too far".

V. Declaring an ordinance to be unconstitutional, years after the improvident denial of a use application, is an insufficient remedy and compensatory damages must be awarded.

The Court in *First English* held that the invalidation of a land use regulation without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

In the interest of facilitating judicial economy, Petitioner urges the Court to further consider whether a declaration that an ordinance is unconstitutional will be a sufficient remedy in light of the loss of substantial investment-backed expectations, especially when years have passed since the improvident denial of Petitioners' use application. Of course, determining the specific measure of compensation will be a matter to resolve on remand.

CONCLUSION

The Court should declare that both the interpretation and enforcement of Respondent's standardless ordinance constituted a temporary regulatory taking and was violative of Petitioner's constitutional rights under the Fifth and Fourteenth Amendments as well as 42 U.S.C. §1983. The matter should be returned to the Kentucky court system for a determination of damages, if any, that resulted by the violation, along with a determination of reasonable attorneys fees.

Respectfully submitted,

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RENDERED: May 13, 1994; 2:00 p.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 92-CA-003110-MR

ENTERPRISES VI, A KENTUCKY GENERAL PARTNERSHIP, ALBERT J. VESPER, III, RONALD J. VESPER, PAUL J. VESPER, STEPHEN J. VESPER, DENNIS J. VESPER and ALBERT J. VESPER, III (GUARDIAN OF ALICIA VESPER ESTATE) — APPELLEES

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH BAMBERGER, JUDGE
ACTION NO. 90-CI-174

V.

BOONE FISCAL COURT and BOONE COUNTY PLANNING COMMISSION — APPELLEES

AND

NO. 93-CA-000262-MR

ERPENBECK COMMERCIAL ENTERPRISES, INC. — APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH BAMBERGER, JUDGE
ACTION NO. 90-CI-174

V.

BOONE COUNTY PLANNING COMMISSION and BOONE COUNTY FISCAL COURT — APPELLEES

OPINION
AFFIRMING

* * *

BEFORE: LESTER, CHIEF JUDGE, GARDNER, JUDGE, and VANCE, SPECIAL JUDGE.

GARDNER, JUDGE: Appellants, Erpenbeck Commercial Enterprises, Inc. (Erpenbeck) and Enterprises VI and various members of the Vesper family (hereinafter collectively referred to as Enterprise) appeal separately from a summary judgment entered by the Boone Circuit Court in favor of the appellees, Boone County Planning Commission (Planning Commission) and Boone County Fiscal Court (Fiscal Court). After carefully reviewing the record, this Court must affirm.

Enterprise owned 263 acres of commercially and industrially zoned property located on Kentucky Highway 18 in Boone County, Kentucky. In 1986, this property had been rezoned from Industrial One (I-1) to Commercial Two (C-2), Planned Development (PD) zone. The C-2/PD allowed a baseline C-2/commercial development subject to an extra layer of regulatory review pursuant to Article 15 of the zoning ordinance. Erpenbeck contracted to buy the 263-acre tract from Enterprise for approximately $27,000 per acre.[1] At the same time, Erpenbeck entered into a contract to sell 43 acres of this tract to

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[1] Erpenbeck had also earlier paid $250,000 to Donald and Debra Streck. The Strecks and Erpenbeck had been negotiating with Hyper Shoppes, Inc. concerning a Biggs Store project. This payment made on June 19, 1989, was for acquiring all rights the Strecks might have. Erpenbeck later sought this amount as damages.

Hyper Shoppes, Inc. (Hyper), and Hyper planned to construct a Biggs Department Store on the site. The alleged price was $120,000 per acre. The front 34.8 acres of this tract was zoned C-2/PD and the remaining nine acres were zoned I-1. The contract between Hyper and Erpenbeck allowed Hyper to pull out of the deal prior to February 28, 1990, or 30 days after the Fiscal Court approved the proper zoning, without suffering any penalty.

Erpenbeck filed an application with the Planning Commission on November 1, 1989, for zoning approval of the Biggs project under the C-2/PD zone.[2] A public hearing on the matter was held on December 6, 1989. The proposed plan showed the buildings in the C-2/PD zone and the parking lot/loading area extending into the I-1 zone. The Planning Commission after reviewing the Biggs plan, the Comprehensive Plan, and hearing all the evidence, recommended rejection of the proposed Biggs project on January 3, 1990. The reasons for rejection included potential traffic problems and incompatibility with the 1986 Comprehensive Plan. On January 11, 1990, Hyper terminated its contract with Erpenbeck. Further, the record reflects that Erpenbeck's option to purchase Enterprise's property expired on February 1, 1990, without being exercised.[3] The Fiscal Court decided on February 6, 1990, to uphold the Planning Commission's decision and

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[2] Erpenbeck also sought to have the zoning line changed, but its proposal was rejected by the Board of Zoning Adjustment. Apparently, no appeal was taken.

[3] Erpenbeck lost $150,000 "good faith" money as a result of this termination and sought this amount as part of its damages.

formally deny Erpenbeck's application for the Biggs project.

Appellants sought relief in Boone Circuit Court through a declaratory rights actions under Chapter 418 of the Kentucky Revised Statutes (KRS). They sought monetary damages based upon violations of KRS 446.070, and KRS Chapter 100, and based upon their claim of an alleged regulatory taking of the property by the appellees. They also brought claims pursuant to 42 U.S.C. Sections 1983 and 1988. The circuit court in an opinion and order of November 20, 1992, granted the defendants' motion to summary judgment. The circuit court ruled that any appeal from the Fiscal Court's decision was moot because there could be no practical effect by reversing since the Biggs deal was no longer viable, and the property had been rezoned again. The court found no legal support for any of Erpenbeck's and Enterprise's claims. Erpenbeck and Enterprise both appealed to this Court.

One of the first considerations for this Court is the mootness issue. The circuit court found that a direct appeal from the Fiscal Court's decision regarding the Biggs proposal was a moot issue, because no practical effect could be gained by reversing the Fiscal Court's decision. There could be no practical effect, because Hyper had terminated the Erpenbeck agreement weeks prior to the Fiscal Court's decision, and Erpenbeck's contract with Enterprise had terminated on February 1, 1990. This Court agrees that the issue of any specific requested relief is moot, because there is no longer a viable Biggs project for the property in question. This Court was presented with a substantially similar situation in *Bourbon County Joint Planning Commission v. Simpson*, Ky. App.,

799 S.W.2d 42 (1990), and held that there could be no practical effect. Thus, we turn to the appellants' claims for damages.

Appellants maintain that the circuit court erred in failing to recognize the validity of their causes of action and in not setting the matter for trial on the question of damages and causation. They first attack the constitutionality of Article 15, the Planned Development Section, of the Boone County Zoning Laws.[4] They contend that the ordinance lacks any ascertainable standards for applicants and creates arbitrary power in local zoning officials in violation of Kentucky Constitution, Section 2. They also argue that the planned development provisions violate the limitations placed upon a county's zoning power by KRS, Chapter 100. The crux of their argument is that the C-2/PD ordinance provides a property owner with no uses for the property. This Court must disagree.

Article 15 defines and governs planned development in Boone County. It states, "Planned Development (PD) is

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[4] The appellants did not provide a copy of Article 15 of the zoning ordinance with their briefs or provide a specific citation to the record so that this Court could locate it. Coincidentally and luckily, this Court found Article 15 when looking through exhibits provided with the record. This Court reiterates that it is not our job to search a record for testimony or items where no reference to the record is furnished. *Young v. Newsome*, Ky., 462 S.W.2d 908, 910 (1971); *Ventors v. Watts*, Ky. App., 686 S.W.2d 833, 834-835 (1985). Further, CR 76.12(4)(c)(iv) provides that an appellant's brief shall contain an argument with ample supportive references to the record and citations of authority pertinent to each issue of law. *Pierson v. Coffey*, Ky. App., 706 S.W.2d 409, 413 (1985).

a special overlay zoning district, which allows some variety among land uses and densities in return for imaginative designs." It also provides,

> Since Planned Development is an overlay zone, there is always an underlying zone which serves as a reference point to determine principally permitted accessory and conditional uses under the standard zoning classifications. However, if certain uses, which are not normally permitted in the underlying zone, are compatible, the Planned Development zone may be flexible to allow these uses. Also, the physical boundaries of the underlying zones within a Planned Development are intended to be flexible and not restrictive.

This Court finds that the circuit court correctly found that Article 15 is not violative of the Kentucky Constitutional provision and KRS, Chapter 100. The circuit court correctly ruled that KRS, Chapter 100 provides for flexible planned development type regulations. As correctly stated by the circuit court, substantially similar zoning provisions were upheld in *Bellemeade Co. v. Priddle*, Ky., 503 S.W. 2d 734 (1973). The Court in that case held that none of the statutes in KRS, Chapter 100 rendered planned neighborhood development zoning impermissible and also upheld the zoning against constitutional attack. The Court found that the zoning provisions were not void for lack of standards. In *Danville-Boyle County Planning and Zoning Commission v. Prall*, Ky., 840 S.W.2d 205 (1992), planned development statutes that were even more similar to those in the instant case were upheld by the Kentucky Supreme Court after being attacked on similar grounds. *See also Agins v. City of Tiburon*, 447 U.S.

255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). There is a presumption favoring the validity of a zoning ordinance, and the burden is upon those attacking it to prove that it is arbitrary. *Clark v. City of Paducah*, Ky., 439 S.W.2d 84, 86 (1969). If there is no more than a doubt about an ordinance's validity, it must stand as a valid exercise of the police power. *Id.*

Thus, this Court finds as a matter of law that the PD zoning provision in the instant case was not unconstitutional or in violation of KRS, Chapter 100. Article 15 expands already existing uses. Enterprise's property was originally zoned I-1, and by changing the zoning to C-2/PD, the appellees were expanding the potential uses of the property. Further, the record reflects that Erpenbeck received an adequate hearing on all facets of its plan for the Biggs store, and there is substantial evidence to support the Planning Commission's and the Fiscal Court's findings. *See Danville-Boyle County Planning and Zoning Commission v. Prall*, 840 S.W.2d at 108; *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, Ky., 379 S.W.2d 450 (1964). The record reflects that a lot of careful thought and analysis went into the Planning Commission's recommendations about the Biggs proposal. Thus, the appellants' argument that the ordinance and its application in this case was arbitrary must fail. The statutes in *Colyer v. City of Somerset*, 306 Ky. 797, 208 S.W.2d 976 (1947); *Board of Trustees of Town of Bloomfield v. Bayne*, 206 Ky. 68, 266 S.W. 885 (1924), and other cases cited by appellants are fundamentally distinguishable.

Appellants also argue that as a matter of law, the enforcement of the PD zoning ordinance constitutes a

taking of their property. They contend that the ordinance's application violates the Fifth Amendment to the United States Constitution and Section 242 of Kentucky's Constitution, because of the alleged taking without compensation. The circuit court's finding that a taking did no occur must be upheld.

Generally, a taking occurs when an owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good. *Lucas v. South Carolina Coastal Council*, ___U.S.___, 112 S.Ct. 2886, 2895, 120 L.Ed.2d 798 (1992). In deciding whether a taking has occurred, a court must consider the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 3119, 87 L.Ed.2d 126 (1985). A land use regulation does not affect a taking if it substantially advances legitimate state interests. *Id.* A state or local government may in exercise of its police powers, incidentally restrict property rights of individuals for the common good without payment. *Department for Natural Resources and Environmental Protection v. Stearns Coal and Lumber Co.*, Ky., 563 S.W.2d 471, 473 (1978). The action taken must bear a real and substantial relation to the public heath [sic], safety, morality or general welfare. *Id.* The takings clause clearly does not require compensation when an owner is barred from putting land to use that is proscribed by existing rules; if the proposed uses are not part of the title to begin with, then there is no taking. *Lucas v. South Carolina Coastal Council*, 112 S.Ct. at 2901.

Almost invariably, some property owners suffer an actual or speculative financial loss as the result of zoning restrictions, but the mere fact that a forbidden use would be more profitable is not an unwarranted hardship which requires a finding of arbitrary action. *Clark v. City of Paducah*, 439 S.W.2d at 86. A diminution in property value alone does not constitute a taking; owners cannot show a taking simply by stating that they have been denied a property interest they heretofore had believed was available for development. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 2663, 57 L.Ed.2d 631 (1978). In *Agins v. City of Tiburon, supra*, the Court upheld a planned development zoning scheme. The court ruled that no taking had occurred as the planned development advanced legitimate governmental goals and was part of the police power. *Id.*, 100 S.Ct. at 2142. A court must consider the benefit to the public as a whole along with any diminution in market value the owner might suffer. *Id.*

As a matter of law, no taking occurred in the instant case. The Fiscal Court simply denied a single project to occur on the property owned by Enterprise.[5] There was no rezoning at question in this case; the property was zoned C-2/PD when Erpenbeck entered into the agreement with Enterprise and when Erpenbeck entered into the agreement with Hyper. All parties knew the zoning

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[5] Erpenbeck never actually owned or had legal title to the property in question as it allowed the option to expire without purchasing the property. *See Monticello Co. v. Commonwealth Natural Resources and Environmental Protection Cabinet*, Ky. App., 864 S.W.2d 921 (1993).

status when they entered into the deal. There are over 200 possible uses allowed under the C-2 zone. In this case, the Planning Commission and Fiscal Court simply denied one project. The reports regarding the proposed project were very thorough. The Planning Commission was trying to advance substantial goals by avoiding excessive traffic and pedestrian congestion, damage to the natural corridor and growth that was not in keeping with the Comprehensive plan. The property had been previously all zoned I-1 and part of it remained zone I-1. Such a project was clearly prohibited in I-1. Appellants have simply failed to show that a taking occurred in the instant case. This case is more akin to *Agins v. City of Tiburon, supra,* and is fundamentally distinguishable from cases cited by appellants.

Appellants also argue that because they were deprived of valuable property rights without substantive or procedural due process of law in violation of the Fourteenth Amendment to the United States Constitution, they are entitled to relief pursuant to 42 U.S.C. §§ 1983 and 1988. This argument is totally without merit.

42 U.S.C. § 1983 provides,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia; subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

A person seeking damages under 42 U.S.C. § 1983 must prove actual injury caused by a denial of his or her constitutional rights. *Memphis Community School District v. Stachura*, 477 U.S. 299, 106 S.Ct. 2537, 2543, 91 L.Ed.2d 249 (1986). There must be a sufficient property or liberty interest shown. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 2708-2709, 33 L.Ed.2d 548 (1972).

Appellants have made absolutely no showing that they are entitled to relief pursuant to 42 U.S.C. §§ 1983 and 1988.[6] The cases cited by them are clearly not applicable to the case at bar. This Court has already found that the zoning ordinance in question was constitutional. As discussed earlier, the record shows that Erpenbeck received a fair hearing, and that there was substantial evidence to support the Planning Commission's and Fiscal Court's decision. There has been no showing of a violation of substantive or procedural due process. Appellants have also failed in proving there was a taking.

Erpenbeck also argues that as a matter of law, appellants have a valid cause of action pursuant to KRS 446.070 for enforcing an ordinance that violated KRS, Chapter

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[6] There is also an issue as to whether an action pursuant to 42 U.S.C. § 1983 was even appropriate in this case, since appellants had not exhausted their state claims or remedies when they brought the action. It has been held that persons bringing 42 U.S.C. § 1983 claims must exhaust all state claims and show that state remedies are inadequate. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 105 S.Ct. at 3121; *Hammond v. Offutt*, 866 F.2d 172 (6th Cir. 1989); *Presley v. Board of Education of Martin County*, Ky. App., 859 S.W.2d 133-134 (1993). Appellants were still pursuing state avenues.

100, and for denying a permit-in violation of KRS 522.030. This argument again totally lacks merit. We have ruled earlier in this opinion that Article 15 of the Boone County Zoning Ordinances did not violate Chapter 100 of the KRS. Further, there has been no showing of official misconduct as discussed in KRS 522.030.

Enterprise contends that there were factual issues regarding the appellants' claim of intentional interference with contractual relations. This argument is unfounded as there has been absolutely no showing that the elements of this tort as outlined in *National Collegiate Athletic Ass'n, By and Through Bellarmine College v. Hornung*, Ky., 754 S.W.2d 855 (1988), exist in the case at bar.

Enterprise lastly argues that the circuit court erred by failing to allow discovery of certain documents. Enterprise has presented no authorities to support its position, and has not specifically identified the documents in question. We have reviewed the record and can find no error on this ground.

Finally, the appellants argue that the circuit court erred by signing an opinion and order prepared by the appellees which granted summary judgment and dismissed all of the appellants' claims. They contend that there were factual issues remaining, and factual conclusions were misstated by the circuit court.

In Kentucky, a summary judgment should be entered if there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Kentucky Rule of Civil Procedure (CR) 56.03. The record must be viewed in a light most favorable to the party opposing the motion, and all doubts are to be resolved in

his or her favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476, 480 (1991). A trial court must only grant a motion for summary judgment if it appears that it would be impossible for the respondent to produce evidence warranting a favorable judgment against the movant. *Id.*; *Paintsville Hospital Co. v. Rose*, Ky., 683 S.W.2d 255 (1985).

In the instant case, there were no genuine issues of material fact. The issue regarding whether Hyper cancelled its contract as a result of the zoning process is immaterial since this Court has found that the zoning ordinance, procedures, and ultimate decision were valid, and since Hyper could pull out for any reason under the terms of the contract with Erpenbeck.

For the foregoing reasons, the judgment of the Boone Circuit Court is affirmed.

LESTER, CHIEF JUDGE, CONCURS.

VANCE, SPECIAL JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

VANCE, SPECIAL JUDGE, DISSENTING. I respectfully dissent from the majority opinion which affirms the summary judgment entered by the trial court. I would hold that the commercial two (C-2) planned development (PD) zone violates the constitution of Kentucky, because it contains no standards from which it can be ascertained whether or not a proposed development is entitled to approval or disapproval, and thus approval or disapproval of any proposed development is left entirely to the arbitrary discretion of the members of the fiscal court.

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BOONE CIRCUIT COURT:
CONSOLIDATED CIVIL ACTION NOS.
90-CI-174 AND 90-CI-175

ENTERPRISE VI, ET AL — APPELLANTS/PLAINTIFFS

vs.

BOONE COUNTY FISCAL COURT, ET AL — APPELLEES/DEFENDANTS

AND

ERPENBECK COMMERCIAL ENTERPRISES, INC., ET AL — APPELLANTS/PLAINTIFFS

vs.

BOONE COUNTY FISCAL COURT, ET AL — APPELLEES/DEFENDANTS

OPINION AND ORDER
GRANTING DEFENDANTS SUMMARY JUDGMENT

* * *

Erpenbeck Commercial Enterprises, Inc. (Erpenbecks), Enterprise VI, and Albert J. Vesper, III (Vespers), appeal Boone Fiscal Court's decision of February 6, 1990. That decision denied Erpenbecks' application under Article 15 of Boone County's zoning regulations to approve a Biggs hypermarket retail center on 43.45 acres owned by Vespers. Their consolidated appeals are pursuant to K.R.S. 100.347. Vespers appeal under this statutory authority even through they were not applicants to Erpenbecks' submitted application.

Vespers and Erpenbecks also seek declaratory judgment relief and money damages from Boone Fiscal Court. They contend Article 15 is unauthorized as zoning regulations under Chapter 100 and that Fiscal Court's actions constitute a compensable taking. They assert inverse condemnation, tortious interference with contractual relations, constitutional violations and violations of state and federal law to support the money damages claims.

The Boone County Planning Commission, organized under Chapter 100, recommended Erpenbeck's application be denied. Fiscal Court and Planning Commission members were sued individually but dismissed as defendants. All remaining parties have moved for summary judgment.

Fiscal Court and the Planning Commission argue that none of their actions caused damage or injury entitling plaintiffs to relief. From the undisputed material facts and applicable law, this Court agrees.

Facts

On July 21, 1989, Erpenbecks contracted to purchase Vespers' 264 acres located on the north side of Kentucky Highway 18 between Zig Zag Road and Old Limaburg Road. All 264 acres had to be purchased and full payment of the $7,250,000.00 price made no later than February 1, 1990. Vespers retained the $150,000.00 earnest money, Erpenbecks having failed to fulfill this contract.

Erpenbecks previously paid $250,000.00 to Donald and Debra Streck and Streck's corporation. Strecks and Erpenbecks had been negotiating with Vespers and Biggs

parent company, Hyper Shoppes, Inc., to acquire the Vesper property and sell part of it to Biggs. This payment, made on June 19, 1989, acquired all rights Strecks might have, even though no contracts then existed with Vespers or Biggs.

Erpenbecks had no agreement with Biggs until August 17, 1989. Biggs reserved the right to terminate the agreement for any reason, in its sole discretion and judgment and could have done so prior to February 28, 1990, or 30 days after Fiscal Court approved Erpenbeck's proposal, whichever was later. On January 11, 1990, Biggs terminated the agreement with Erpenbecks, approximately 3 weeks before Fiscal Court acted. Further, since Erpenbecks failed to fulfill their contract with Vespers by purchasing all 264 acres no later than February 1, 1990, that contract became null and void by its own terms. When Fiscal Court acted on February 6, 1990, Erpenbecks no longer had a contractual interest in the property comprising their application.

Erpenbeck's application comprised 43.45 acres that was part of the Vesper property. Only 34.8 acres was zoned for commercial retail use and was subject to a planned development overlay classification under Article 15. The remaining approximate 9 acres was zoned industrial, not commercial retail, and was not subject to a planned development overlay review. None of the 43.45 acres has ever been zoned to allow as a matter of right the Biggs retail center.

Fiscal Court so zoned this 43.45 acres in 1986 as part of the county-wide zoning update. Prior to that time, all

of the 264 acres was zoned industrial. The C-2/PD provided an opportunity that the Vesper property previously never had. It allowed commercial development, subject to the extra layer of regulatory review under Article 15. That review would allow commercial development compatible with the 1986 comprehensive plan. Erpenbecks knew the Vesper property's zoning classification in June, 1989. They acknowledged that classification in the contracts with Vesper and Biggs, providing that zoning approval required Fiscal Court approving Erpenbeck's application and concept development plan by enacting an ordinance.

Erpenbecks submitted their application for a Biggs hypermarket retail center on November 1, 1989. It sought approval for 417,600 square feet of regional retail space on the 34.8 acres commercially zoned. All the shipping and receiving area and some of the 2,113 parking spaces needed for this intense regional retail development extended into the industrial zone. These facilities were exclusively to serve the commercial development and were not accessory to any industrial use in the industrial zone. Plaintiffs argue that this approximate 9 acre overlap imposes no adverse land use impact since parking and shipping areas are allowed in the industrial zone to serve industrial users. The distinction, however, is that by allowing the commercial regional retail development to extend by this magnitude into the industrial zone, the massive commercial development in the C-2/PD zone becomes larger, generating higher volumes of regional retail traffic.

The 1986 Boone County Comprehensive Plan recommends that this segment of Kentucky 18 be commercially

developed, but not for regionally oriented massive retail that generates high volumes of traffic. That type of regional retail development is identified as being more appropriate and suitable for areas closer to the interstate highway system, such as Mall Road. For this reason, the Commission recommended and the Fiscal Court zoned the property with a planned development overlay. Without that regulatory review process it would not have been consistent with the comprehensive plan to zone the area commercial two. That zoning classification, without a planned development overlay, would have allowed massive regionally oriented retail development, contrary to the comprehensive plan.

For Erpenbecks, it was crucial that Biggs purchase the 43.45 acres. Without that purchase, Erpenbecks would not close with Vespers on the 264 acres. While Biggs purchase was crucial to Erpenbecks, Biggs at no time was obligated to perform under its agreement with Erpenbecks. When Biggs terminated, it was entitled to a complete refund of its earnest money, with accrued interest. At that time, Biggs did not know costs for the concept development plan had exceeded the only installment paid for those costs of $50,000.00. Only to compromise a dispute with Erpenbecks did Biggs pay more than that installment of $50,000.00 for development plan costs.

The facts further clearly show that even had the Erpenbeck application received Fiscal Court approval, it was not fully acceptable to Biggs for purchase purposes. Biggs wanted the retail center building located to the rear of the 43.45 acres, in the industrial zone. That placement would provide a larger parking field between the retail center and Kentucky 18 and was necessary to make the

plan more acceptable to Biggs. Pierre A. Wevers, executive vice-president of Hyper Shoppes considered placing the Biggs retail center in the industrial zone part of the general process of the Erpenbeck plan getting zoning approval. Michael C. Phillips, then Director of Real Estate for Hyper Shoppes, oversaw this project for Biggs. Being unable to place the hypermarket building in the industrial zone meant, to him, that the site and Erpenbeck's plan was unacceptable and unusable for a Biggs. Even had Fiscal Court approved the Erpenbeck plan, there is no evidence Biggs would have purchased the 43.45 acres.

From the undisputed facts, the following dates are significant:

1. June 19, 1989 – Erpenbecks $250,000.00 payment to Strecks;

2. July 21, 1989 – Date of Vesper-Erpenbeck Contract;

3. August 17, 1989 – Date of Erpenbecks-Biggs (Hyper Shoppes) Contract;

4. November 1, 1989 – Erpenbeck application filed with commission;

5. December 6, 1989 – Public Hearing date before Commission;

6. January 3, 1990 – Commission recommendation to Fiscal Court;

7. January 11, 1990 – Biggs terminates Erpenbeck Contract;

8. February 1, 1990 – Erpenbeck option to purchase Vesper property expires without being exercised; and

9. February 6, 1990 – Fiscal Court final action denies Erpenbeck application.

Applicable Law

Erpenbecks and Vespers allege, based on Fiscal Court's denial, Biggs cancelled the agreement with Erpenbeck and, in turn, Erpenbeck cancelled the agreement with Vespers. Clearly, Biggs terminated the Erpenbeck agreement weeks prior to the Fiscal Court action and Erpenbeck's contract with Vespers terminated by its own terms on February 1, 1990. There no longer was a viable application for a Biggs retail center and Erpenbeck had no contractual interest when Fiscal Court acted, and Vespers were not parties to that application. Therefore, Erpenbecks and Vespers are not aggrieved persons by the Fiscal Court's action as required by K.R.S. 100.347 and they are not entitled to relief under that statutory appeal. Further, the appeal presents a moot issue as there can be no practical effect by reversing Fiscal Court's decision. Another factor rendering the appeal moot is Fiscal Court rezoned the previous C-2/PD area to a commercial four zone as part of the county 1991-1992 comprehensive plan and zoning update. This new classification does not allow regional retail development at the intensity proposed for the Biggs retail center. See K.R.S. 100.347; *Bourbon Co. Joint Planning v. Simpson*, Ky.App., 799 S.W.2d 42 (1990); and *Shelby Petroleum v. Croueher*, Ky.App., 814 S.W.2d 930 (1991).

These same mootness considerations apply to plaintiff's request for declaratory judgment relief. However, even if not moot, Fiscal Court's decision adopting the

Commission's recommendation and its findings are supported by the record. The supporting committee report dated January 3, 1990, comprises nine pages, listing numerous reasons to deny, based on land use impacts, the comprehensive plan, intensity of development, traffic generation, land use incompatibility, and the development extended into the industrial zone. Deference must be afforded governmental administrative regulatory decisions and upheld if substantial, reliable and probative evidence within the record as a whole support the decision. *American Beauty Homes Corp. v. Louisville*, Ky., 379 S.W.2d 450 (1964), *Louisville v. McDonald*, Ky., 470 S.W.2d 173 (1971), and *Hocker v. Fisher*, Ky.App., 590 S.W.2d 342 (1979).

Here, the record supports the Fiscal Court's decision and the Commission recommendation. To hold otherwise requires approval of a development that conflicts with the comprehensive plan and extends commercial development into an industrial zone. See *Carlton v. Taylor*, Ky.App., 569 S.W.2d 679 (1978).

Plaintiffs argue Fiscal Court's action constitutes a regulatory compensable taking, as applied or on its face, under federal and state law. They contend the planned development regulations do not advance a legitimate governmental interest, are not authorized under Kentucky law, and prohibit all beneficial or productive use. This Court finds no legal support for these arguments, based on these facts.

The planned development overlay had a C-2 underlying zone, recognizing numerous uses that Erpenbecks

or Vespers could pursue. Those regulations did not prohibit or ban submittal of applications for any of these uses. Only the delay associated with the review process was caused by the planned development overlay. This process does not amount to a moratorium as plaintiffs urge. Instead, it imposes a regulatory review process based on the comprehensive plan to determine the compatibility, appropriateness and intensity for uses in the underlying zone. Rather than prohibiting all use, these regulations provided a review process under which any of numerous uses may have been approved and, therefore, do not represent a compensable taking. See *First English v. Los Angeles Cty.*, 107 S.Ct. 2378 (1987); *Pennell v. City of San Jose*, 108 S.Ct. 849 (1988); *Keystone Bituminous Coal v. DeBenedictus*, 107 S.Ct. 1232 (1987); and *Com., Nat. Resources v. Starns Coal and Lumber*, Ky., 678 S.W.2d 378 (1984).

Kentucky law provides broad authority for zoning regulations. K.R.S. 100.201 and .203 recognize as legitimate purposes for zoning those same reasons and land use impacts applied herein as part of the planned development review.

These statutes authorize zoning under local governments' police powers to promote public health, safety and general welfare within the planning unit. Facilitating orderly and harmonious development, regulating intensity of land use, preventing overcrowding of land and congestion in the circulation of people are specifically recognized as legitimate governmental purposes for exercising zoning authority. Special zoning districts promoting proper development of planned business or

commercial districts and regulating activities and structures on land at or near major thoroughfares, interchanges, transportation arteries, and other places having a special character are expressly authorized. This broad statutory authority has been recognized to include and encourage flexible planned development type regulations. See Tarlock, *Kentucky Planning and Land Use Control Enabling Legislation, Etc.*, 56 Ky. L.H. 556 at 598 (1968).

In *Bellemeade Co. v. Priddle*, Ky., 503 S.W.2d 734 (1974) similar if not identical regulations were upheld under these statutes. Where regulations promoting these legitimate governmental purposes are consistent with the comprehensive plan, they are a valid exercise of Chapter 100 zoning authority. Moreover, the planned development review process did not apply in all zoning districts. Plaintiffs could have pursued a number of uses under the C-2/PD zone or sought a rezoning to another district without the planned development overlay.

Clearly Article 15 is consistent with and advances recognized legitimate governmental interests of regulating land use. Plaintiffs seek the equivalent of a judicially imposed zone change, without following Chapter 100. This, the Court cannot do. *Sladon v. Shawk*, Ky.App., 815 S.W.2d 404 (1991) and *Louisville v. McDonald*, supra. Even if the overlay regulations are invalidated, plaintiffs are not unilaterally entitled to a C-2 zone. Plaintiffs never sought a zone change and a C-2 zone allows development contrary to the comprehensive plan. The Court cannot assume such legislative power. Instead, the prior industrial zoning would apply and Erpenbecks still would not have been entitled to approval. See *Mann v. City of Ft. Thomas*, Ky., 437 S.W.2d 209 (1969).

For the same reasons plaintiffs' facial taking argument must be rejected. To prevail, the mere enactment of the overlay regulations in 1986 must show on its face a prohibition of all productive use. Mere delay associated with a regulatory review process that allows some productive use is not a taking on its face. It must be applied to determine whether it will amount to a taking. *Agins v. City of Tiburon*, 100 S.Ct. 2138 (1980); *Penn Central v. City of New York*, 98 S.Ct. 2646 (1978); *Lucas v. South Carolina Coastal Council*, ___S.Ct.___ dec'd June 29, 1992; *First English*, supra; and *Pennell*, supra. Other property in the immediate vicinity zoned C-2/PD has approved commercial development at a lesser intensity.

Other states applying the Supreme Court's taking analysis reach the same result. Even wetland legislation does not affect a compensable taking where the owner may apply for uses that could be approved under a discretionary approval process. Where property is subject to such a process when the developer contracts to purchase, that developer has no protected investment backed interest or expectation that the approval will be granted. *Gil v. Inland Wetlands and Watercourses*, 593 A.2d 1368 (Conn. 1991); *Namon v. DER*, 558 So.2d 504 (Fla. 1990); and *Carabell v. DNR*, 478 N.W.2d 675 (Mich.App. 1991).

Denial of the most profitable or beneficial use of land is not a constitutional violation of just compensation or substantive due process. *Andrus v. Allard*, 100 S.Ct. 318 (1979) and *Euclid v. Ambler Realty Co.*, 47 S.Ct. 114 (1926). Judge Bertelsman followed this same principle in a Kentucky case. See *Stratford v. State-House, Inc.*, 542 F.Supp. 1008 (E.D. Ky. 1982).

Plaintiffs additionally cite K.R.S. 446.070 and 522.030 for statutory damages. There is no proof of statutory violations entitling plaintiffs to money damages. Plaintiffs also assert a tort claim for interference with contract relations. There is no proof to support allegations of improper interference by defendants. Further, defendants were engaged in regulatory functions of government of a quasi-judicial nature which does not constitute tortious conduct for which they can be liable in tort. See K.R.S. 65.2003; *NCAA v. Hornung*, Ky., 754 S.W.2d 855 (1988); and *Bolden v. City of Covington*, Ky., 803 S.W.2d 577 (1991).

Plaintiffs argue the zoning administrator approved the extension of commercial development into the industrial zone. They offer the administrator's October 5, 1989, letter as his ruling. This Court rejects this argument. K.R.S. 100.271 prohibits a zoning administrator from allowing uses that do not conform to the literal terms of the zoning regulations. Only the Fiscal Court can approve uses for areas subject to a PD overlay. The October 5th letter merely informs that the PD review may allow some minimal overlap. Erpenbeck's application was not filed until November and its overlap exceeded 10% mentioned in the informational letter. Cases cited by plaintiffs involve instances where the official had authority to make a decision. Here, the administrator had no authority to approve uses in areas zoned planned development.

Another pending matter is Vesper's motion to compel production of documents. The parties have submitted memoranda and the Court has reviewed the documents in-camera. These documents clearly are communications within the attorney-client relationship on legal matters arising from that relationship. This Court has previously

held the documents are not subject to inspection under the Open Records Act. Further, the documents are not relevant in themselves, nor calculated to lead to relevant facts. Plaintiff's motion to compel is overruled.

ORDER

Based upon these facts and authorities plaintiffs cannot prevail and Boone Fiscal Court and Boone County Planning Commission are entitled to judgment as a matter of law.

IT IS HEREBY ORDERED AND ADJUDGED that Boone Fiscal Court and Boone County Planning Commission are granted Summary Judgment, dismissing all claims and plaintiffs' appeals.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED that plaintiffs' motions for declaratory judgment and summary judgment are overruled and denied, with prejudice.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED that this is a final and appealable judgment pursuant to Civil Rule 54.02 and there is no just reason for delay. The Clerk is directed to provide notice of entry of this order pursuant to Rule 77.04.

/s/ J. F. Bamberger
JUDGE,
BOONE CIRCUIT COURT

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COMMONWEALTH OF KENTUCKY

COURT OF APPEALS
NO. 92-CA-003110-MR

ENTERPRISES VI, A KENTUCKY
GENERAL PARTNERSHIP,
ALBERT J. VESPER, III,
RONALD J. VESPER,
PAUL J. VESPER,
STEPHEN J. VESPER,
DENNIS J. VESPER and
ALBERT J. VESPER, III
(GUARDIAN OF ALICIA
VESPER ESTATE) APPELLEES

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH BAMBERGER, JUDGE
ACTION NO. 90-CI-174

v.

BOONE FISCAL COURT and
BOONE COUNTY PLANNING
COMMISSION APPELLEES

AND: 93-CA-000262-MR

ERPENBECK COMMERCIAL
ENTERPRISES, INC. APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH BAMBERGER, JUDGE
ACTION NO. 90-CI-174

vs.

BOONE COUNTY PLANNING
COMMISSION and BOONE
COUNTY FISCAL COURT APPELLEES

ORDER DENYING PETITION FOR REHEARING

* * *

BEFORE: LESTER, CHIEF JUDGE; GARDNER, JUDGE, and VANCE, SPECIAL JUDGE.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

/s/ Charles B. Lester
JUDGE, COURT OF APPEALS

ENTERED: Aug 26, 1994

SUPREME COURT OF KENTUCKY
94-SC-769-D & 94-SC-778-D
(92-CA-3110-MR & 93-CA-262-MR)

ENTERPRISE VI, A KENTUCKY GENERAL PARTNERSHIP, ET AL. — MOVANTS

BOONE CIRCUIT COURT
NO. 90-CI-174

v.

BOONE COUNTY FISCAL COURT, ET AL. — RESPONDENTS

AND

ERPENBECK COMMERCIAL ENTERPRISES, INC. — MOVANT

BOONE CIRCUIT COURT
NO. 90-CI-175

v.

BOONE COUNTY FISCAL COURT, ET AL. — RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motions for review of the decisions of the Court of Appeals are denied.

Entered December 14, 1994.

/s/ Robert F. Stephens
Chief Justice

COURT OF JUSTICE
BOONE CIRCUIT COURT
BOONE COUNTY, KENTUCKY

ENTERPRISE VI, a
Kentucky General Partnership
ALBERT J. VESPER III
RONALD J. VESPER
PAUL J. VESPER
STEPHEN J. VESPER
DENNIS J. VESPER
General Partners

Case No. 90-CI-174

(Filed Jul. 5, 1991)

and

ALBERT J. VESPER III, Guardian
of the Estate of Alicia Vesper

Appellant-Plaintiffs

vs.

BOONE COUNTY FISCAL COURT
BRUCE FERGUSON
DON DAVIS
IRENE PATRICK
SHIRLEY MEIHAUS
BOONE COUNTY PLANNING COMMISSION
LARRY BARNETT
FRED BURCH
LAWRENCE COLLINS
R. N. GREENE
RECTOR JONES
ROBERT KIRBY
DONALD McMILLAN
BARRY NELTNER
THURMAN OWENS
RALPH RUSH
FLOYD SHARP
CAROL SMITH
WILLIAM VIOX
ERPENBECK COMMERCIAL ENTERPRISES, INC.

Appellee-Defendants

NOTICE OF APPEAL FROM DECISION OF BOONE COUNTY FISCAL COURT AND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND MONETARY DAMAGES

****

DEMAND FOR TRIAL BY JURY

****

1. Appellants, Enterprise VI, a Kentucky general partnership, Dennis J. Vesper, managing partner, and Albert J. Vesper III, guardian for the estate of Alicia Vesper, are the owners of real estate located in Boone County, Kentucky, on Route 18, which is fully described in Exhibit "A" attached to the original action.

2. Appellants hereby give Notice of Appeal to the Boone Circuit Court from the final decision of the Boone County Fiscal Court, rendered February 6, 1990, adopting the recommendation of the Boone County Planning Commission denying the utilization of the underlying zone on the property of the Appellants.

3. The Appellants, and each of them, have been injured and aggrieved by the action of the Boone County Fiscal Court and bring this Appeal pursuant to Kentucky Revised Statutes §100.347 as interpreted and applied by the Boone County Fiscal Court through its "Zoning Regulations: Boone County, Kentucky" adopted December 1986, (herein "Zoning Order") Section 230.

4. Appellants appeal the action of the Boone County Fiscal Court as contrary to law and fact in that:

A. The decision of the Boone County Fiscal Court is contrary to and arbitrary based on the evidence presented; or

B. The decision of the Boone County Fiscal Court was arbitrary in that it was not supported by substantial evidence; or

C. The action of the Boone County Fiscal Court denying Appellant's use of its property causes Appellants to be treated differently than other persons similarly situated and inconsistent with the mandates of K.R.S. §100.203 requiring uniformity of regulations; or

D. The action of the Boone County Fiscal Court in denying Appellants the use of their property bears no reasonable relationship to the public health, safety, morals, or general welfare of Boone County; or

E. The action of the Boone County Fiscal Court in denying the use of the Appellants' property is unreasonable, arbitrary, and confiscatory and is an abuse of its discretion; or

F. The Boone County Fiscal Court's Zoning Order, Article 15, is contrary to, not authorized by and inconsistent with Chapter 100 of the Kentucky Revised Statute; or

G. The action of the Boone County Fiscal Court in denying the use of the Appellants' property is inconsistent with the "Zoning Order" in that:

(i) The Fiscal Court has applied the Zoning Order, Article 15, regulations to the Appellants' property although no Concept Development Plan has been proposed or adopted for the subject property by the Boone County Fiscal Court as required by Zoning Order, §1502; and/or

(ii) The Boone County Fiscal Court and the Boone County Planning Commission failed to follow the requirements of the Zoning Order, §1506, when it failed to make a finding that the proposed use of Appellants' property did not "deviate from standard district regulations"; and/or

(iii) The Boone County Fiscal Court failed to implement and enforce its Zoning Order when the proposed use of the Appellants' property was authorized under the Zoning Order, including Articles 9 and 10.

5. The action of the Boone County Fiscal Court and its Boone County Planning Commission in denying the use of the Appellants' property was a violation of the Fifth and Fourteenth Amendments to the Constitution of the United States prohibition against depriving "any person of life, liberty or property without due process of law" and violative of sections 13 and 242 of the Constitution of the Commonwealth of Kentucky.

WHEREFORE, the Boone Circuit Court is asked to review the actions of the Boone County Fiscal Court and render appropriate orders.

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Enterprise VI and
Albert J. Vesper III, Guardian

AMENDED
COMPLAINT FOR DECLARATORY JUDGMENT
AND
MONETARY DAMAGES

I. Introduction

1. This action is brought pursuant to Kentucky Revised Statute, Chapter 418, and the Rules of Civil Procedure and seeks a declaration of rights of the Plaintiffs under Kentucky Planning and Zoning Statutes, Kentucky Revised Statute 100.111 et seq. and the "Zoning Order: Boone County, Kentucky," adopted December 1986. Additionally, Plaintiffs seek an award of damages from the Boone County Fiscal Court for inverse condemnation; interference with contractual relations, violations of the United States Constitution, Constitution of Kentucky, federal and state law and in the alternative, against the other Defendants individually.

II. Parties

2. Enterprise VI is a Kentucky general partnership consisting of Albert J. Vesper III, Ronald J. Vesper, Paul J. Vesper, Stephen J. Vesper and Dennis J. Vesper, who serves as managing partner. Albert J. Vesper III is guardian for the estate of Alicia Vesper pursuant to an order of the Kenton District Court, Probate Division (herein individually and collectively referred to as "Vesper"). Vesper has been aggrieved and injured by the actions of the Boone County Fiscal Court and the Boone County Planning Commission.

3. Vesper is the owner of a 264 acre parcel of real estate located in Boone County, Kentucky, on Kentucky 18

at Limaburg, Kentucky. The subject of this litigation is a particular 43.45 acre site which is part of the larger tract and described in Exhibit A attached (herein "Zoned Parcel").

4. The Boone County Fiscal Court (herein "Fiscal Court") is the chief body with legislative power in the county where the Zoned Parcel is located. It has the authority to regulate the zoning in unincorporated areas of Boone County pursuant to Chapter 100 of the Kentucky Revised Statutes (herein "Zoning Enabling Legislation").

5. The Fiscal Court acts through its county commissioners and the county-judge executive. The members of the Fiscal Court are Bruce Ferguson, as County-Judge Executive, Don Davis, Commissioner, Shirley Meihaus, Commissioner, and Irene Patrick, Commissioner (herein "Fiscal Court Members")

6. The Boone County Planning Commission (herein "Commission") is the planning unit established by the Fiscal Court pursuant to the Zoning Enabling Legislation to perform planning operations for the Fiscal Court and operate as an administrative body of the Fiscal Court in performing those duties. Included within these duties is (i) the making of recommendations to the Fiscal Court under Article 3 of the Zoning Order and (ii) review with recommendation of applications under Article 15 of the Zoning Order.

7. Defendants, Larry Barnett, Fred Burch, Lawrence Collins, R.N. Greene, Rector Jones, Robert Kirby, Donald McMillan, Barry Neltner, Thurman Owens, Ralph Rush, Floyd Sharp, Carol Smith, and William Viox, are members

of the Boone County Planning Commission (herein "Commission Members"), who in their capacity as commissioners have taken part in action described in rejecting the use of the Zoned Parcel, all of which have aggrieved and injured Vesper. William Viox is Chairman of the Commission (herein "Chairman") and has authority and acted in such capacity uniquely in relation to the Zoned Parcel.

8. Erpenbeck Commercial Enterprises, Inc., is a Kentucky corporation (herein "Erpenbeck") who contracted with Vesper to purchase among other property, the Zoned Parcel. Erpenbeck was the applicant before the Fiscal Court and Commission for utilization of the underlying zone on the Zoned Parcel and is a Defendant in this action pursuant to K.R.S. 100.347(4).

FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF

III. Statement of Case and Controversary

9. In December of 1986, the Fiscal Court adopted the Zoning Order based upon alleged authority granted by the Zoning Enabling Legislation.

10. Pursuant to the Zoning Order, the Fiscal Court adopted a Zoning Map for Boone County which indicated that a Zoned Parcel was zoned a combination of "C-2" Commercial District Two and "I-1" Employment District Industrial One. The section of the Zoned Parcel designated "C-2" was overlaid with a "PD" Planned Development special zoning district as defined by Article 15 of the Zoning Order.

11. The "C-2" District is the type of zoning which permits a variety of retail business and office uses without limit to the market area which is serviced including but not limited to: department stores, discount stores and major purchase retail centers. The purpose of a "C-2" district is:

> " . . . to provide comparable shopping goods, personal and professional services, and some convenience goods required for normal living needs as well as major purchase opportunities." (Zoning Order, §920).

Uses in a "C-2" district includes all uses permitted in a "C-1" or "O-1" district. The minimum size of a development in a "C-2" district is two acres with maximum intensity for development over four (4) acres of 18,000 square feet of gross floor space per acre.

12. The "I-1" Employment District Industrial One is a type of zoning which permits small to medium scale transportation, warehouse, light manufacturing and related services. Uses permitted in the district include but not limited to: wholesale manufacturing, distribution and assemblage of products, and truck terminals. The minimum size of the development is five acres with the maximum intensity not exceeding 25,000 square feet of gross floor space per acre.

13. Pursuant to the Zoning Order, the placement of a "C-2" district (§920) and "I-1" district (§1030) are located on suitable lands with access to expressways or arterial roads in a regional trade and transportation environment.

14. The "PD" Planned Development is a special overlay zoning district, provided for in the Zoning Order, Article 15, which allows some variety among land uses and densities. Article 15 of the Zoning Order describes the intent of the "PD" district as:

> " . . . to provide a permissive and *alternative zoning procedure* . . . (for) . . . proposals capable of providing substantial values to the community *over the conventional districting and other regulations* prescribed as normal course in this order . . . "(§1500) (emphasis added)

A "PD" is an overlay zone which means there is always an *underlying zone* which serves as a reference point to determine principally permitted uses under the standard zoning classification. A "PD" zoning will allow variance of use, design, intensity, size and other features of a development. A "PD" district will allow intensity of uses equal to 150% of use permitted in the underlying district.

(A) Zoning with a "PD" Overlay District.

(i) Pursuant to the Zoning Order, a planned development district overlay may be approved by the Commission and Fiscal Court in the manner provided by Article 15 (§1502).

(ii) The procedure for obtaining a "PD" overlay is initiated by the owner of the property to be overlaid with the "PD" designation:

> (1) the owner meets with the commission staff, where, among other things, the staff would specify the modifications required of the Concept Development Plan and the applicability of other regulations (§1503);

> (2) the owner submits a Concept Development Plan (§1504);
>
> (3) the Commission conducts a public hearing (§1505);
>
> (4) the Commission makes a recommendation on the Concept Development Plan (§1506); and
>
> (5) the Fiscal Court acts on the Commission's recommendation (§1507) by placing the "PD" overlay, on the owner's property.

This procedure is the only procedure described in Article 15 for the application of a PD to an underlying zone in Boone County.

(B) The Commission's Review of the Concept Development Plan.

In reviewing the Concept Development Plan (step 3 above), the standard that the Commission is required to apply is specified in Zoning Order §1506 as:

> " . . . it is consistent with the intent and purpose of this order; whether the proposed development . . . justify the *deviation from the standard district regulations.*" (emphasis added)

15. The Zoned Parcel has never been the subject of an approved Concept Development Plan. Accordingly, pursuant to the Zoning Order, the Zoned Parcel was not subject to the regulations of Article 15.

16. By placing the PD overlay on the Zoned Parcel, without owners request, the Fiscal Court allowed no permitted uses on the parcel without further legislative action.

17. A parcel with a PD overlay placed upon it at the initiative of the Fiscal Court, cannot obtain a zone permit under Article 14 of the Zoning Ordinance without legislative action by the Fiscal Court.

18. Vesper, by contract, agreed to sell the Zoned Parcel, along with the balance of the tract of land, to Erpenbeck.

19. Erpenbeck contracted to sell to Hyper Shoppes, Inc., dba Bigg's (herein "Bigg's"), the Zoned Parcel for the construction of a retail shopping mall to accommodate a Bigg's discount store (herein "Project").

20. Bigg's had the option to withdraw from the purchase should Erpenbeck be unsuccessful in timely obtaining the necessary permits from Boone County for the construction of the Project.

21. Erpenbeck similarly had the option to withdraw from the contract of purchase and sale with Vesper if Erpenbeck was unsuccessful in obtaining the necessary permits from Boone County for the construction of the Project.

22. Erpenbeck, through its officers and agents, met with the staff of the Commission and explained the details of the Project.

23. The purpose of this meeting and other meetings with the staff of the Commission was for the staff to advise Erpenbeck of any manner in which the Project proposal violated requirements of zoning laws so that modifications, if necessary, could be made or considered before the public hearing.

24. Erpenbeck explained that the Project was or could be modified to be wholly consistent with the underlying zoning on the Zoned Parcel and that to resort to the rezoning or increased densities of the PD overlay (as provided in Article 15 of the Zoning Order) was unnecessary.

25. The staff of the Commission, including the Boone County Zoning Administrator, Jerry Newton, instructed Erpenbeck that no proposal for the Zoned Parcel would be accepted without the filing of a Concept Development Plan as defined by Article 15 of the Zoning Order and K.R.S. §100.111(8).

26. At no time prior to the final decision was Erpenbeck advised of any manner in which the Project violated requirements of the underlying "C-2" or "I-1" zoning or any other zoning regulation.

27. Erpenbeck protested the submission of a Concept Development Plan since the Project was consistent with the underlying zoning on the Zoned Parcel.

28. Based on the Zoning Administrators interpretation of the Zoning Order, Erpenbeck was incorrectly and needlessly required to submit a Concept Development Plan to the Commission and to undergo the procedures of Article 15 of the Zoning Order.

29. In an effort to mitigate damages, on November 1, 1989, Erpenbeck filed an application affecting the Zoned Property for "The Utilization of an Underlying Zone in Planned Development" with the Commission which clearly disclosed that the uses and intensities of the Project were consistent with the underlying zone and

that none of the benefits of a PD Planned Development were requested or required.

30. The Commission scheduled a public hearing for November 29, 1989, on the application at which time the hearing was rescheduled to December 6, 1989, because of the large number of witnesses in attendance.

31. On December 6, 1989, a Public Hearing was conducted by the Commission at the Boone County High School gymnasium where the staff delivered its report and testimony was taken from various witnesses.

32. Although not reflected in the minutes of the Commission meetings, the application of the Erpenbeck's was apparently assigned by the Chairman to a committee for review and recommendation. This committee consisted of Barry Neltner, Fred Burch, Rector Jones, Larry Barnett, Carol Smith and Phil Damstrom (who did not appear to participate).

33. The Committee of the Commission filed its report, dated January 3, 1990, and made no findings regarding the Project and its relationship to the underlying zoning nor did the Committee determine whether the Project was a deviation from the standard district regulations.

34. The Committee, in its report, concluded the Project was evaluated from a "land use standpoint" and volunteered the Erpenbeck proposed end-user of the Zoned Parcel (i.e. Bigg's) could find other locations in Boone County.

35. On January 3, 1990, the Commission without comment adopted the report of the Committee and recommended to the Fiscal Court "that the proposed use not be allowed."

36. The Boone Fiscal Court, at its meeting on February 6, 1990, without comment, adopted the final action of the Commission and refused the use of the Zoned Parcel as described in the Project.

37. Based upon the actions of the Fiscal Court, Bigg's have cancelled the contract with Erpenbeck and Erpenbeck has cancelled the contract with Vesper.

IV. Argument

38. Defendants, Fiscal Court and Commission, and the individual Commission members named herein, in denying the use of the underlying zone on the Zoned Parcel grossly abused its discretion, acted contrary to law, and acted in a manner that bears no reasonable relationship to the public health, safety, morals, or general welfare.

39. The Defendants (other than Erpenbeck) have adopted procedures inconsistent with the Zoning Order and/or applied the Zoning Order in such a manner as to deny Vesper the reasonable and proper use of the Zoned Parcel. These procedures included but were not limited to:

(a) misapplication of the PD Planned Development Overlay Zone designation; and/or

(b) failure to make findings as required by §1506 of the Zoning Order.

40. Vesper had exhausted all available and reasonable administrative remedies and/or appeals, and any other remedies, if any, would be unduly burdensome on Vesper or unreasonable.

41. The restrictions, limitations and procedures imposed by the Defendants, other than the Erpenbecks, upon the use of the Zoned Parcel through the Zoning Order and its interpretation:

(a) bear no reasonable relationship to the public health, safety, morals, or general welfare, and are in excess of the legislative and regulatory power of the Fiscal Court and the Commission; and

(b) are improper, invalid, and contrary to law as applied; and

(c) are unreasonable, arbitrary, and confiscatory, and, therefore, unconstitutional.

42. The actions of the Fiscal Court in adopting Article 15 of the Zoning Order as interpreted by the Commission and the Fiscal Court in its use of PD Overlay Zoning is contrary to and not authorized by the Zoning Enabling Legislation and is thereby an abuse of the powers of the Fiscal Court, unreasonable and arbitrary.

43. The action of the Fiscal Court and the Commission and its Commission members in denying the request of the Erpenbecks for use of the Zoned Parcel:

(a) is not supported by substantial evidence, but is clearly erroneous based on reliable, probative, and material evidence in the records; and

(b) was based on matters which were irrelevant, immaterial, nonsupportive, and as such, were insufficient for denial, and thereby constituted arbitrary and capricious action on the part of the offending Defendants.

44. The rights of Vesper are affected and continue to be affected by the Zoning Order as interpreted and applied by the Fiscal Court, Fiscal Court members, Commission, and Commission members in such a manner as to seriously injure and affect the property rights of Vesper, to wit:

(a) Offending Defendants are exercising unconditional and unfettered discretion as to what type of development may occur on the Zoned Parcel; and/or

(b) Offending Defendants are applying and interpreting the various conditions, requirements, and recommendations of the Zoning Order in such a manner to arbitrarily and capriciously deny requests for development of the Zoned Parcel.

45. The Project submitted to the Commission and Fiscal Court by Erpenbeck was, in fact, wholly consistent with the Zoning Order.

V. Relief Sought

Appellant-Plaintiffs demand:

A.) The Court declare the denial of the use of the Zoned Parcel as proposed in the Project by Erpenbeck and the restrictions and limitations imposed by the Fiscal Court and Commission upon the Zoned Parcel are unreasonable, arbitrary, confiscatory, and not reasonably

related to the public health, safety, morals, and general welfare, and therefore, are unconstitutional and invalid;

B.) The Court declare that the placing of the "PD" Planned Development district overlay zoning on the Zoned Parcel was inconsistent with the Zoning Order, and that Article 15 of the Zoning Order has no application to the Zoned Parcel or in the alternative as applied to the Vesper property is unconstitutional and void;

C.) The Court declare that the findings of the Commission and Fiscal Court in denying the use of the Zoned Parcel as requested by the Project filed by Erpenbeck were not in accord with the mandates of the Zoning Order for review of such Project and thus was null and void;

D.) The Court declares that the Fiscal Court and Commission's action in denying the reasonable use of the Zoned Parcel and/or in not authorizing the reasonable use thereof, constituted a gross abuse of discretion and are contrary to the law; and

E.) The Court declares that the Project proposed by Erpenbeck is a reasonable and proper use of the Zoned Parcel, and therefore, is permitted;

F.) The Court declare that the actions of the Defendants constitute the causes of action hereinafter set out in the Second through the Sixth Causes of Action; and

G.) The Court awards Plaintiffs the costs of the is Court and this litigation and reasonable attorney fees; and

H.) The Court award Plaintiff all further relief, legal and equitable, to which Plaintiff may be entitled.

SECOND CAUSE OF ACTION SEEKING AN AWARD OF MONETARY DAMAGES AS TO THE BOONE COUNTY FISCAL COURT (INVERSE CONDEMNATION)

46. The Plaintiff repeats and realleges the allegations of the previous paragraphs and incorporates same as if written herein.

47. The acts or actions of the Defendants, and each of them, previously referred to herein (except Erpenbeck) were the acts taken by agents and employees of the Fiscal Court.

48. All such acts by agents and employees were taken by such agents and employees acting in their official capacities or acting under color of laws and in accordance with official policy, custom and practice of the Fiscal Court.

49. This cause being against the Fiscal Court, the funds and property held in the name of Boone County, Kentucky, or the Fiscal Court will be subject to execution as a result of any award to Vesper in this action.

50. Under this cause of action, Vesper does not seek an award that would result in subjecting to execution the funds or property held in the names of individual Defendants other than Boone County, Kentucky, or its Fiscal Court.

51. The action of the Defendant, Fiscal Court, in denying the use of Plaintiffs' Zoned Parcel was without authority and in violation of the Fifth and Fourteenth

Amendment of the United States Constitution and sections 1(5), 2, 3, 13, 14, 59 and 242 of the Constitution of the Commonwealth of Kentucky.

52. As a result of the unauthorized taking of an interest in Plaintiffs' property, a right has accrued to Plaintiff for recovery from the Defendant, Fiscal Court, of just compensation of the interest taken from the date in which that taking was affected, February 6, 1990.

THIRD CAUSE OF ACTION SEEKING AN AWARD OF MONETARY DAMAGES AS TO THE BOONE COUNTY FISCAL COURT (STATUTORY VIOLATION)

53. Plaintiff repeats and realleges the allegations of all paragraphs and incorporates same as if written herein.

54. The action of the Defendant, Fiscal Court, in adopting, interpreting and/or enforcing the Zoning Order is inconsistent with the provision of the Zoning Enabling Legislation and Sections 1(5), 2, 3, 13, 14, 59 and 242 of the Kentucky Constitution and has caused Plaintiff to suffer damages for which recovery is provided under K.R.S. 446.070.

FOURTH CAUSE OF ACTION SEEKING AN AWARD OF MONETARY DAMAGES AS TO THE BOONE COUNTY FISCAL COURT (INTERFERENCE WITH CONTRACTUAL RELATIONS)

55. Plaintiff repeats and realleges the allegations of all paragraphs and incorporates same as if written herein.

56. Vesper had agreed to sell the Zoned Parcel and the adjoining tract of land to Erpenbeck and Erpenbeck

had agreed to purchase the Zoned Parcel and the adjoining tract of land. This contract was known to the Defendants.

57. As a direct result of the Defendants' refusal to timely allow the use of the Zoned Parcel, Erpenbeck has cancelled the agreement to purchase the Zoned Parcel and the adjoining tract of land.

58. Certain agents of the Fiscal Court have intentionally and improperly engaged in conduct in their official capacity to cause Erpenbeck not to complete this contract. The conduct and acts of the Fiscal Court and its agents were without justification, contrary to legal requirements, and in excess of and an abuse of their authority.

59. As a result, Vesper has lost the benefit of its bargain and Vesper has been damaged in an amount as not yet determined.

FIFTH CAUSE OF ACTION SEEKING AN AWARD OF MONETARY DAMAGES AS TO THE BOONE COUNTY FISCAL COURT
(42 U.S.C. §1983 and §1988)

60. Plaintiff repeats and realleges the allegations of all paragraphs and incorporates same as if written herein.

61. The Defendants' action referred to herein (other than Erpenbeck) are in violation of the Fifth and Fourteenth Amendments of the Constitution of the United

States in that they constitute a taking of Vesper's property without just compensation and deprivation of Vesper's property without substantive or procedural due process of law.

62. The Defendants taking and deprivation of Vesper's property caused Vesper substantial loss and damage. Included in such loss and damage are the diminution in the value of the property by the taking, even if deemed temporary.

63. Vesper is entitled to recover its loss and damages from the Fiscal Court pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and pursuant to 42 U.S.C. §1983 and 42 U.S.C. §1988, and their reasonable attorney's fees pursuant to 42 U.S.C. §1988.

SIXTH CAUSE OF ACTION IN THE ALTERNATIVE SEEKING AN AWARD OF MONETARY DAMAGES OF THE FISCAL COURT MEMBERS AND COMMISSION MEMBERS (ACTION IN THE ALTERNATIVE TO FIFTH CAUSE OF ACTION)

64. Plaintiff repeats and realleges the allegations of all paragraphs and incorporates same as if written herein.

65. This cause of action is in the alternative to the Second, Third, Fourth and Fifth Causes of Action and only advanced if the Fiscal Court denies the allegations of paragraphs 47 and 48 above, or offers an affirmative defense discharging the Fiscal Court from liability for the acts of the Fiscal Court Members or Commission members or other agents of the Fiscal Court which would not be available to such members.

66. The actions of the Fiscal Court Members and/or Commission Members were taken by such Defendants acting in their official capacities and acting under color or law, but said actions were not taken pursuant to official policy, custom or practice of Boone County, Kentucky or its Fiscal Court.

67. The acts or actions of the Fiscal Court Members of Commission Members were taken negligently or willfully in the real or feigned belief that same were in accordance with the official policy, custom or practice of Boone County, Kentucky, or its Fiscal or the Commission.

68. The illegality of the Fiscal Court Members or Commission Members' actions are clearly established and such illegality was known or should have been known to them at the time the actions were taken.

69. The Fiscal Court Members or Commission Members are jointly and severally liable to Vesper on the preceding causes of action.

70. Vesper seeks a judgment which would subject the funds and property held in the name of the Fiscal Court Members or Commission Members to execution.

WHEREFORE, the Plaintiff demands:

A) Judgment for the Plaintiff against Boone County Fiscal Court for the loss, damage and expense in an amount as not yet determined but in excess of the minimal jurisdiction of this Court.

B) For interest at the lawful rate from the date of loss, damage or expenses until judgment is paid.

C) In the alternative, judgment against the individual Fiscal Court Members and Commission Members under the Sixth Cause of Action in an amount as not yet determined.

D) Recovery of costs and attorney fees and for all other relief to which it is entitled.

E) For trial by jury on the issues presented in this cause of action.

/s/ Paul J. Vesper
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Attorney for Appellant/Plaintiffs

CERTIFICATION

I hereby certify that a true and correct copy of the foregoing Amended Complaint was served upon Dale Wilson, Attorney for Boone County Planning Commission and its Members, 7699 Tanners Lane, Florence, KY 41042; Larry Crigler, Attorney for Boone Bounty Fiscal Court and its Members, 2995 Washington, Burlington, KY 41005; Thomas R. Nienabor, Attorney for Erpenbeck, P.O. Box 6910, Florence, KY 41042; and to Alex Talbott, 2100 First National Tower, 101 S. Fifth Street, Louisville, KY 40202-3129, on this the ___ day of May, 1991, by ordinary United States Mail, first-class, postage prepaid.

/s/ Paul J. Vesper
PAUL J. VESPER

* * *

[p. 22] property?

A. I don't believe those come to us for our action.

Q. When you used the term earlier, "if it's recommended to us", what were you just talking about? What would come to you on a recommendation basis? Do you know?

A. If there is certainly, an object of the planned development overlay is that that particular design come to us for approval.

Q. All right. So when you were talking about recommendation, you were thinking ahead to a P. D. situation?

A. Correct.

Q. So my specific question to you earlier, if a piece of property is zoned C-2 and the proposed use of it is a principally permitted use, doesn't require a zone change, doesn't require a variance, or anything else, would that use come to the Fiscal Court for action? And your answer would be?

A. No.

Q. Now if a person wants to a use a piece of property that's zoned P.D., are there any principally permitted uses in the Boone County planning ordinance, [p. 23] excuse me, in the Boone County ordinance?

A. No.

Q. Can a P. D. zone under the Boone County ordinance stand by itself?

A. Okay, I've never had a P.D. zone come to us. Every P.D. zone comes, whatever is requested of a P.D. zone comes to the Court for approval.

Q. All right. Here's my question though. You testified earlier that C-2 is a zoning district in Boone County.

A. Yes.

Q. You also testified that P.D. is a zoning district in Boone County.

A. I'm not confident saying yes to that as a zoning district.

Q. Okay. Lets see if your zoning ordinance helps us.

A. I'm trying to think of maps where the simple designation is planned development. In the City of Union I can think of spot there that it is.

Q. Did I miss the point to you? You said, –

A. Your question was, does it stand on its own as a planned development.

[p. 24] Q. Right. Have you ever remembered an occasion where the zoning map, in adopting the zoning map for Boone County a parcel of land simply had the designation P.D.?

A. To my recollections are like small community planned development. I'm hard pressed to advise that planned development stands on its own.

Q. So then it is your understanding of the zoning ordinance that a piece of property could not be zoned just P.D.?

A. I'd have to defer for lack of knowledge on that.

Q. Okay. Let me show you zoning ordinance, Article 5, Section 5.20 it's called, "District Identification". "For the purposes of this Order, the Cities of Florence, Union, Walton and Boone County are hereby divided into the following categories of zoning districts." And it does show a C-2.

A. Yes.

Q. And it also shows a P.D.; am I correct?

A. I see that, yes.

Q. Now, not to mislead you, the P.D. has a definition, has a designation of the name of the district and it's called planned development overlay.

[p. 25] A. Yes.

Q. So, there's, is there such a thing though as a P.D. zone in the Boone County ordinance?

A. I'd have to admit, I have no knowledge of it standing on its own.

Q. C-2 is a zoning district in Boone County that does stands by itself.

A. Correct.

Q. So as the Boone County Fiscal Court interprets its zoning ordinance, P.D. is not a separate individual zone.

A. I would view it with that interpretation, yes.

Q. So if a piece of property was zoned simply P.D., that would first be a violation of the ordinance; am I correct?

A. I could not comment on that; I would not know.

Q. If a piece of property has a P.D. zone on it in Boone County, –

A. Yes.

Q. What are its uses?

A. My association with a P.D. zone as an overlay or an attachment to the zone. I don't see it [p. 26] free standing?

Q. All right. Well lets [sic] go back and ask this question. What was the designation of the parcel that is the subject of this litigation again?

A. C-2 P.D.

Q. Now let me direct you to Section 5-20 of the zoning ordinance.

A. Yes.

Q. Do you see a designation in the district identifications anywhere of a zone district called C-2 P.D.?

A. It's not printed in that form, no.

Q. All right. Well this section 5-20 does say that the Boone County is divided into the following categories of zoning districts and it enumerates them; am I correct?

A. Yes.

Q. And there's a C-2 and there's a separate one called a P.D. but there's no one called C-2 P.D.?

A. I see that, yes.

Q. And you'll agree with that statement?

A. I agree that it's not, the P.D. is defined as planned development overlay.

Q. And that's taken care of in Article 15?

[p. 27] A. Yes.

Q. So the parcel that's the subject of this litigation was zoned C-2 P.D.

A. That's my understanding.

Q. And it's in Boone County.

A. Yes.

Q. And you testified that the uses of a piece of property that's zoned C-2 are clearly specified in Article 9?

A. Correct.

Q. And you didn't find any uses of a piece of property in the Boone County zoning district when it's defined P.D?

A. Correct.

Q. Now, when I combine the two zones and call it C-2 P.D., what is the uses permitted by the Boone County Fiscal Court by its ordinance in that property?

A. It's uses would be those that conform to C-2 with the considerations that are requested under planned development.

Q. Now, I'm going to use those terms if I can. I got to write that down because I'm going to come back to that frequently. I think's that, in fact, I want it so specific, would you tell me what that was again he [p. 28] said?

(THE REQUESTED PORTION OF THE RECORD WAS READ BY THE REPORTER.)

Now, I'm going to ask you in light of your answer to go to Article 15 or anywhere else in the zoning ordinance and specify with me, for me if you can what the considerations are that are requested by the P.D. in that Article?

A. Well, there are a number of matters for consideration.

Q. All Right.

A. Which are outlined here.

Q. That's, you're answering the question to you can answer it any way your comfortable. When you testified that they must conform to the considerations that are requested by the P.D.?

A. Yes.

Q. If you can enumerate them for me, that's fine. If you can't, that's an answer also. Whatever you want to tell me constitutes considerations that are requested?

A. The considerations I believe are adequately listed in Article 15. All I would be doing for you is reading those.

[p. 29] Q. Okay. Is it the entire Article 15 or is it specific or when you adopted the ordinance you broke it down into sections?

A. Um-hum.

Q. Is it a specific section or what?

A. No. I would say it's everything embodied in there that would be applicable to this particular piece of property.

Q. Okay. Including Section Number 1500 on intent?

A. Yes.

Q. So anything that's in here?

A. Yes.

Q. Now if a piece of property in Boone County is zoned C-2 P. D., can they use that property without reference to Article 15?

A. No; my consideration, no.

Q. If a piece of property in Boone County is zoned C-2 P.D. and they only want to use the uses in Boone County under this ordinance which are permitted under Article 9, Section 9-20, can they use the property for those uses?

A. Restate please.

Q. I will. A piece of property in Boone [p. 30] County under this ordinance at this time is zoned C-2 P.D. but the applicant only chooses to use the property for the uses specified in Article 9 with reference to C-2, may they use the property for that purpose?

A. Not without the consideration of the planned development being applied to it.

Q. Okay. A piece of property in Boone County is zoned C-2 P.D. under the current zoning ordinance therefore would you agree with this statement, has no principally permitted use without further action from the Boone Fiscal Court?

A. Yes.

* * *

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Nos. 94-1494 and 94-1516

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 94-1494

ERPENBECK COMMERCIAL ENTERPRISES, INC.,

Petitioner,

v.

BOONE COUNTY FISCAL COURT, *et al.*,

Respondents.

No. 94-1516

ENTERPRISE VI, *et al.*,

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v.

BOONE COUNTY FISCAL COURT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Do Petitioners have a protected property interest in the only zoning application denied to support a Fifth Amendment taking and a Fourteenth Amendment due process claim pursuant to 42 U.S.C. §1983.

II. If so, do Respondents' actions constitute a Fifth Amendment taking and Fourteenth Amendment due process violation of that property interest.

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STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or

> Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured and in an action at law, suit in equity, or other proper proceeding for redress.

Article 15 of the Boone County Zoning Regulations appearing in Petitioner, Erpenbeck Commercial Enterprises, Inc., Appendix, 53.

COUNTERSTATEMENT OF THE CASE

Petitioners, Erpenbeck Commercial Enterprises, Inc., (Erpenbeck) and Enterprise VI (Vesper), omit and misrepresent key facts supporting the Boone Circuit Court and Court of Appeals of Kentucky decisions. These undisputed facts which demonstrate federal questions and law were decided consistent with decisions of this Court. Nor is an unsettled question of federal law presented.

Petitioners had no constitutional protected right to the only zoning approval denied and the C-2/PD zoning classification does not violate the Constitution. Petitioners assert the same arguments as their prior Petition for a Writ of Certiorari (Case No. 94-939) denied on January 17, 1995. Respondents here are the government entities on which Respondents in Case No. 94-939 served as members.

On July 21, 1989, Erpenbeck contracted to purchase all or none of Vespers' 264 acres. That contract contained a protective contingency, but Erpenbeck waived that protection on November 6, 1989. (App. *Infra*, 1a). Prior to a public hearing on Petitioners' Article 15 application, Erpenbeck removed its protected contingency.

Failing to close on the 264 acres by February 1, 1990, Erpenbeck forfeited its $150,000.00 earnest money to Vesper. (Petitioner Erpenbeck App., 17, fn. 3).

Crucial to purchase of the 264 acres was Erpenbeck selling 43.45 acres of it to Hyper Shoppes, Inc., (Hyper), parent company of Biggs Hypermarket. Without that sale, Erpenbeck would not close on the 264 acres. Erpenbeck had no agreement with Hyper until August 17, 1989. Tha agreement was only an option, giving Hyper the right to terminate for any reason prior to February 28, 1990, or 30 days after Boone Fiscal Court approved a development plan under Article 15, whichever was later. Even if Boone Fiscal Court approved the Erpenbeck development plan, Hyper had the right to terminate for any reason. (Petitioner Erpenbeck App., 16, and App., *Infra,* 22a).

Prior to 1986 all 264 acres was zoned industrial. As part of a 1986 comprehensive plan and zoning regulation update, a portion was zoned C-2/PD. The 264 acres is on the north side of Kentucky State Route 18, two miles west of interstate highway I-75 and I-71. The 1986 C-2/PD zoning provided a transition area between large residential developments south of Kentucky State Route 18 and industrial uses to the north. It allowed over 200 different commercial and office uses at a clustered, non-regional intensity. This segment of the Kentucky 18 corridor contained several large, undeveloped tracts making it sensitive to large scale, regional retail developments. These developments attract high volumes of regional traffic. The C-2/PD zone allowed more varied uses than C-1 or C-2 zones for existing and growing residential population in western Boone County. Section 1514 (Petitioner Erpenbeck App., 63) permitted uses not listed in the underlying zone. It made commercial

and office uses available to residents without going to congested areas near the interstates I-75 and I-71. The PD overlay regulated intensity of the underlying uses. It provided protection from the larger scale regional retail uses extending down the Kentucky 18 corridor from I-75 and I-71. The C-2/PD zone coordinated development with infrastructure in an area identified as needing protection in the comprehensive plan. The Court of Appeals of Kentucky correctly found that the C-2/PD zoning expanded uses for the site. (Petitioner Erpenbeck App., 20).

This C-2/PD zoning implemented the 1986 comprehensive plan and its land use plan element. That plan recommended this segment of the Kentucky 18 corridor be commercially developed, but not for regionally oriented massive retail. Regional retail development generates high volumes of traffic and the comprehensive plan identified areas closer to the I-75 and I-71 interstate highway system as appropriate for those uses. Without a PD overlay as part of the zoning classification, C-2 zoning would have allowed massive regional oriented retail development, contrary to the comprehensive plan. Over half the 264 acres remained zoned industrial (I-1) without the extra layer of PD review. Over 40 industrial uses were available as a matter of right. Access to the I-1 property could occur through the C-2/PD zone without overlay review. The PD review was triggered only when C-2 uses were sought in the C-2/PD zone. (Petitioner Erpenbeck App., 28-29).

Petitioners applied for C-2/PD approval on November 1, 1989. The development plan comprised 43.45 acres, 34.8 acres were zoned C-2/PD and 9 acres industrial (I-1). It showed 417,600 square feet of regional retail space and 2,113 parking spaces, all needed for the

regional retail use. All the retail center's commercial shipping and receiving areas and some of the required 2,113 parking spaces, were located in the industrial zone. (Petitioner Erpenbeck App., 28). The proposed development required excavation of 10,800,000 cubic feet of ground and the parking spaces measured 422,600 square feet, not including driving aisles. Over 90% of the 43.45 acres was under roof or paved. This proposal was regional retail development on a grand scale. It did not comply with existing zoning, conflicted with the comprehensive plan, and could not have been approved as submitted.

Petitioners contend they were wrongly subjected to PD overlay review and only applied to mitigate damages and exhaust remedies. This groundless contention is refuted by Erpenbeck's contract with Hyper dated August 16, 1989. Section 5(a) recites approval of a Concept Development Plan is required pursuant to applicable zoning regulations. Section 5(c) is more explicit, providing:

> "Final approval of the Concept Development Plan will not be deemed to have occurred until the Concept Development Plan with conditions acceptable to Buyer (Hyper) is adopted by the Boone County Planning Commission and a corresponding ordinance is adopted by the Boone County Fiscal Court and the time for appeal pursuant to K.R.S. Section 100.347 has expired without an appeal being filed." (App., *Infra*, 10a-11a).

This contract predates Petitioners' application by over two months. Petitioners knew when contracting with Hyper that ministerial review for principally permitted uses of an unrestricted C-2 zone did not apply. They knew Boone Fiscal Court final action by passing an ordinance was required for C-2/PD approval.

Petitioners knew their development plan extended beyond the 34.8 acres zoned commercial. To meet the February 1, 1990, closing deadline under the Vesper contract, Erpenbeck sought to move the C-2/PD zoning line through a zoning administrator interpretation to include the 9 acres zoned industrial. The zoning administrator refused to move the zoning line and Erpenbeck appealed the the Board of Zoning Adjustment. They were proceeding before that Board as well as the Planning Commission at the same time. (Petitioner Erpenbeck App., 17, fn.2). Petitioners were not taken by surprise by new or unknown regulations. They were well aware of the C-2/PD zoning classification, its requirements, and location on the 264 acres. Erpenbeck has owned, developed and served as consultants for property zoned with a PD overlay. Adjacent to the subject 43.45 acres is a 5.5 acre parcel Erpenbeck proposed to use as access to the regional retail center. It had C-2/PD and C-3/PD zoning with an approved development plan for car dealerships. On January 29, 1993, Erpenbeck sold this 5.5 acres to Waco Oil Company, Inc., for $530,000.00. That development plan was amended through PD review for a McDonald's restaurant. (App., *Infra,* 27a).

Petitioners own other large parcels of land and sought map amendments to zones witha PD overlay. On January 18, 1995, the same Erpenbeck family members received a favorable recommendation for C-2/PD rezoning on a 466 acre site. (App., *Infra,* 31a-37a). Petitioners own actions decimate their argument that C-2/PD zoning on its face allows no uses and is worthless.

Petitioners urge their development plan should have been reviewed based on unrestricted C-2 zoning. This argument is based on zoning the property never had. (Petitioner Erpenbeck App., 16). If the C-2/PD had been instead unrestricted C-2, the project still extended com-

mercial retail facilities into an industrial zone. The project could not have been approved as a matter of right even if the 34.8 acres had been zoned C-2. The commercial intrusion into the I-1 zone is a zoning deviation. Without a PD overlay as part of the zoning classification, this zoning deviation could not have even been considered. (Petitioner Erpenbeck App., 59-60, Sec. 1506).

Petitioners' position the C-2/PD zone lacked standards is unsupported. Section 1504 requires a development plan before developing any property having a PD overlay as part of its zone. Minimum contents include transportation patterns, existing and proposed land uses and structures and relationship of the proposed development to the comprehensive plan, which includes its land use plan element. (Petitioner Erpenbeck App., 56).

Section 1506 (Petitioner Erpenbeck App., 59-60) requires the Planning Commission to apply certain standards in reviewing a proposed development based on facts presented at a public hearing. The Planning Commission must apply the following criteria to a proposed development plan:

(1) Consistency with Section 1500;

(2) Whether proposed development advances general welfare of the community and neighborhood; and

(3) Whether the proposed land uses, innovation of physical design, and the inter-relationship with the land uses in the surrounding area justify deviation from standard district regulations.

Section 1500 PD (Petitioner Erpenbeck App., 53-54) criteria for reviewing a development plan includes:

(1) A useful pattern of open space;

(2) A development pattern preserving and utilizing natural topography, trees and vegetation in ex-

change for development intensity elsewhere on site;

(3) Encourages cluster development as a more efficient use of land; and

(4) Development in harmony with land use density, transportation facilities, community facilities and objectives of the comprehensive plan.

The Planning Commission applied these standards and recommended the development plan be denied. A nine (9) page report listed reasons based on land use impacts, conflict with the comprehensive plan, excessive intensity of the development, traffic generation issues, land use incompatibility, and the development's extension into the industrial zone. (App., *Infra*, 38a-52a).

Petitioners did not challenge the Planning Commission's recommendation or any of its findings, but attended the Boone Fiscal Court meeting of February 6, 1990. Unknown to Respondents, Hyper had already terminated its agreement. The only C-2/PD project proposed no longer existed. Petitioners were aware Boone Fiscal Court could override the recommendation. Erpenbeck had consulted for other PD developments in which the Planning Commission recommendation had been overridden by the governmental legislative body.

Petitioners improperly inject subsequent approval for a Biggs Hypermarket elsewhere in Boone County. That approved site received a zoning map amendment nearly a year later containing many conditions making it compatible with the comprehensive plan. It abutted I-75 and I-71 and had access to three interstate interchanges. Among the zone change conditions, Biggs was not permitted to open until major road improvements were completed. No elected or appointed official of Respondents or any of

their staff steered Hyper to this or any other site. (App. *Infra,* 53a-60a, 63a-66a).

Petitioners blatantly misrepresent testimony of Bruce Ferguson, then Boone County Judge/Executive. He was the chief elected official of the County's legislative body. Petitioners' counsel acknowledged they were not seeking expert testimony from him. (Ferguson dep., pp. 4-7, 17 and 59-61). Judge Ferguson testified the C-2/PD zone allowed uses referenced by the underlying zone, subject to considerations of the extra layer of review through the PD process. Three times Judge Ferguson disagreed with Petitioners' comments that PD zoned property had no use. (Ferguson dep., pp. 27, 29-30, 49 and 66). Judge Ferguson simply testified that the many underlying C-2 uses would be subject to the PD overlay review on property zoned C-2/PD.

Petitioners' continued attack on Boone Circuit Judge Bamberger's Opinion is unjustified. Kentucky's Court of Appeals rejected this argument and the Supreme Court of Kentucky denied discretionary review. (Petitioner Erpenbeck App., 12 and 15). Petitioners first made this charge in a Motion to Alter, Amend and Vacate. Judge Bamberger issued a 3 page Order overruling, stating the Opinion and Order as entered "is this court's independent decision." Petitioners were asked to tender a proposed Opinion, made no objection, and submitted an opinion to Judge Bamberger. (App., *Infra,* 67a-69a).

Petitioners argue they have a federal constitutional right to unrestricted C-2 zoning. The unsoundness of this position is clear. It depends on zoning the property never had and Petitioners never sought through a zone change. Boone Fiscal Court rejected this zoning during three county wide zoning updates. Petitioners had no protected

property interest as a matter of right to a project that violated zoning and conflicted with the comprehensive plan.

REASONS FOR DENYING PETITION

Petitioners have shown no violation of any constitutional right. Instead, Petitioners ask this Court to employ the Constitution as a means to become a "federal super-legislative body" to oversee local government legislative zoning decisions. Respondents' C-2/PD zoning decision lawfully advanced legitimate government interests in regulating land use. This zoning accomplished this purpose without denying Petitioners' viable use. Respondents' actions do not constitute a Fifth Amendment taking or a Fourteenth Amendment due process violation.

Petitioners had no constitutional right or entitlement to the only C-2/PD approval sought. Nor does the Constitution mandate a rezoning to unrestricted C-2, a zone the property never had. Petitioners lack a legitimate protected property interest in the only application denied, which leaves their 42 U.S.C. §1983 claims unsupported.

ARGUMENT

I.

PETITIONERS LACK A PROTECTED PROPERTY INTEREST IN THE ONLY ZONING APPLICATION DENIED TO SUPPORT A FIFTH AMENDMENT TAKING AND A FOURTEENTH AMENDMENT DUE PROCESS CLAIM UNDER 42 U.S.C. §1983.

Petitioners had no constitutionally protected entitlement or justifiable expectation to development free of all regulation. *Board of Regents v. Roth*, 408 U.S. 564 (1972). Since *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), land use has been subject to reasonable government regulation based on planning. Only where government goes too far or leaves the owner with no viable use is the Constitution violated. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

In *Nectow* zoning as applied left no practical use and *Mahon* found the Kohler Act solely regulated a private dispute. These regulations failed to advance a legitimate government interest, violating due process. In both instances, a clear protected entitlement or expectation was affected, which Petitioners lack.

Petitioners possessed a legitimate expectation to commercially develop that portion zoned commercial, subject to a development plan satisfying the criteria of the PD review. This process included a review for development intensity consistent with the comprehensive plan and existing or planned infrastructure. Petitioners had no legitimate entitlement as a matter of right to commercial development extending into the I-1 zone which failed to satisfy the limited discretionary C-2/PD procedure. Rather than overreaching, the C-2/PD and I-1 zoning promoted Petitioners' protected interest. It provided

zoning to enable Petitioners to develop property consistent with proper land use planning. Petitioners had no constitutional entitlement as a matter of right to development that deviated from existing zoning.

The Kentucky Court of Appeals properly relied on *Agins v. City of Tiburon*, 447 U.S. 255, 261-262 (1980). Petitioners misread *Agins* as based on ripeness. To the contrary, *Agins* holds as a matter of law that Tiburon's residential planned development overlay zone on its face did not violate the Fifth Amendment or Fourteenth Amendment. The overlay review regulated intensity of proposed development, just as the Respondents' C-2/PD zone. Facially, it denied no use and owners were free to pursue reasonable investment backed expectations by submitting development plans. The overlay zone in *Agins* advanced the same government interests of assuring careful and orderly development without excessive intensity and providing open space that the C-2/PD regulation promotes. See also *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Regulations imposing a reasonable discretionary review process are facially neutral, denying no use. Existence of a permitting review system implies approval can occur. Accordingly, mere enactment of a discretionary regulation does not on its face violate due process or constitute a taking. *Keystone Bituminous Coal Ass'n. v. DeBenedictus*, 480 U.S. 470 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

The Constitution affords government the right to govern. No protected interest or expectation is lost facially to a discretionary review and approval process. There is no constitutional right to be free of all delay. *First English Evan. Luth. Ch. v. Los Angeles Cty.*, 482 U.S.

304, 321 (1987). Only where extraordinary regulatory delay results, leaving no viable use without advancing legitimate government interest has there been government overreaching. The C-2/PD regulation imposed no unusual delay and Petitioners never applied for commercial development approval confined to the commercial zone.

Petitioners wrongly rely on *Lucas v. South Carolina Coastal Council*, _____ U.S. _____, 112 S.Ct. 2886 (1992) to assert a protected property interest. David Lucas' beach lots when purchased were zoned and approved for development with no further discretionary review. South Carolina's Beachfront Management Act precluded all occupiable structures on either of these two lots, with no exception. Thereafter, the Act was amended to provide a special use process, but until then Mr. Lucas' constitutional investment backed expectations were denied. Petitioners never had unrestricted C-2 zoning and many alternative viable uses were available through the PD review process.

Lucas, supra, supports Respondents, holding no constitutional violation occurs when the proscribed use or activity was not part of Petitioners' protected expectations, title or ownership. Kentucky and other states have so applied *Lucas* in several cases involving discretionary regulatory approvals. *Ward v. Harding, Ky.*, 860 S.W. 2d 280 (1993); *Wheeler v. City of Wayzata*, 511 N.W. 2d 39 (Minn. 1994); *Dodd v. Hood River County*, 855 P.2d 608 (Or. 1993); *Comnty. Conc. Citizens v. Union Twp.*, 613 N.E.2d 580 (Oh. 1993); and *Kelly v. TRPA*, 855 P.2d 1027 (Nev. 1993), *cert. denied*, 114 S.Ct. 684 (1994). Two federal decisions reflecting a long line of cases applying this Court's precedent are *Silver v. Franklin Tp. Board of Zoning Appeals*, 966 F.2d 1031 (6th Cir. 1992) and *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227 (9th

Cir. 1994), *cert. denied*, 115 S.Ct. 193 (1994). Consistent with the state court decisions, these cases hold there is no constitutional legitimate claim of entitlement or justifiable expectation to discretionary permit approval. Both decisions uphold regulations requiring discretionary permit plan approval as constitutional. See also *RRI Realty Corp. v. Inc. Village of Southampton*, 870 F.2d 911 (2nd Cir. 1989) and *Spence v. Zimmerman*, 873 F.2d 256 (11th Cir. 1989). Petitioners cite no authority recognizing a facially protected constitutional expectation as a matter of right to a discretionary regulatory zoning permit.

II.
RESPONDENTS' ACTIONS DO NOT CONSTITUTE A FIFTH AMENDMENT TAKING OR FOURTEENTH AMENDMENT DUE PROCESS VIOLATION.

Assuming a constitutional protected entitlement, Respondents' actions do not constitute a taking under the Fifth Amendment or a Fourteenth Amendment due process violation of that property interest. The C-2/PD zoning advanced a legitimate government interest and did not deny Petitioners all beneficial or productive use of the property, particularly when considering the entire 264 acres as a whole, as Petitioners did. Moreover, this regulation and denial of the only development plan submitted are not actions of undue interference of an arbitrary, capricious, or irrational character. It has a legitimate and appropriate relation to the government objective to be obtained through that regulation. *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

Kentucky law enables local government to enact zoning regulations based on a prior prepared comprehensive

plan. Chapter 100 of the Kentucky Revised Statutes is the enabling legislation for regulating land use. Authorized purposes of regulation are set forth in K.R.S. 100.201 and 100.203(1). These purposes include facilitating orderly and harmonious development, and regulating density of population and intensity of land use. Other purposes include protection of transportation facilities, particularly activities at or near transportation arteries. To accomplish these statutory purposes, local governments may enact special zoning districts pursuant to K.R.S. 100.203(1)(e). These are the very purposes underlying the need for the C-2/PD zoning within the Kentucky 18 corridor. Such zoning made available many uses not otherwise appropriate by regulating intensity through the PD review process. It advanced legitimate government interest of coordinating development with infrastructure and provided many alternative realistic uses.

Kentucky courts have interpreted the enabling legislation, recognizing that PD overlay zones are allowed. *Bellemeade Co. v. Priddle,* Ky., 503 S.W.2d 734 (1974) and *Danville-Boyle County v. Prall*, Ky., 840 S.W.2d 205 (1992) uphold identical standards and criteria as the challenged Article 15. When keyed to a comprehensive plan, discretionary overlay zones are valid exercises of the police zoning power and do not lack sufficient standards. To meet these standards, Petitioners could have scaled the project down to a less intensity, clustered the development to provide open space and afforded compatibility with adjacent residential development to the south and west. Lessened intensity would lower traffic generation and be consistent with the comprehensive plan.

Regulatory taking and due process analysis focuses on the purpose of the challenged regulation, whether it

advances a legitimate government interest, the economic impact, and what remains. The challenged C-2/PD regulation advanced government interests through implementation of the comprehensive plan while expanding available uses for the Kentucky 18 corridor. While Respondents denied Petitioners only application, that denial did not preclude all viable use, nor was it so intended. The January 3, 1990, Committee Report adopted by the Boone Fiscal Court concludes (App., *Infra*, 52a):

> "This site has many development possibilities, however, we do not believe that this is an appropriate use based on the information stated and for the reasons listed above. Further, we are of the opinion that this use could occur in Boone County if properly located."

Petitioners misapply *Dolan v. City of Tigard*, _____ U.S. _____, 114 S.Ct. 2309 (1994). There, local government exacted private property for a public purpose without showing any connection between the regulated development and the need for the exaction. Respondents imposed no condition amounting to an exaction. Petitioners proposed a development violating zoning and failing to conform to the comprehensive plan and other PD criteria. In *Dolan* the proposed use and its intensity was allowed as a matter of right.

Petitioners cite *City of Buford v. Ward*, 443 S.E.2d 279 (Ga. 1994) and *New Motor Vehicle Board of Ca. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978). These decisions do not support Petitioners. In *City of Buford* due process and equal protection claims were dismissed as a matter of law for the very reason Petitioners fail here. Governmental denial of a permit did not violate a constitutionally protected right or entitlement. The same principle applied in *Orrin W. Fox Co.* as no protected liberty or

property interest was found to satisfy *Board of Regents v. Roth*, 408 U.S. 564 (1972). *Grayned v. City of Rockford*, 408 U.S. 104 (1972) upholds a noise ordinance as having sufficient standards. While its contents were flexible, what it prohibited as a whole was found constitutionally clear. For similar reasons, *Anderson v. City of Issaquah*, 851 P.2d 744 (1993), does not support Petitioners. This decision found invalid an architectural review regulation based on unwritten and undescribed "feeling" or "image" for development on a particular street. Decision makers were left with only their individual subjective feelings about what the image should be. The regulation was not keyed or referenced to any particular description in a comprehensive plan or similar land use study. Such is not the case with Article 15.

Article 15 standards and criteria reference specifically the comprehensive plan and other appropriate land use factors for this segment of the Kentucky 18 corridor. These standards and criteria provide that degree of ascertainability required in *Standard Mining and Development Corp. v. Auburn*, 510 P.2d 647 (1973), which is cited and distinguished in *Anderson*. In *Standard Mining* zoning regulations governing special discretionary use permits for gravel pit operations were challenged for lack of standards. Since a discretionary permit was required with a public hearing review process, standards keyed to the comprehensive plan were upheld. These flexible standards as part of a public hearing review with a right of appeal satisfied due process. The C-2/PD review required a public hearing and findings made from facts presented. Petitioners were afforded and availed themselves of the statutory appeal process under K.R.S. 100.347 as part of their Complaints and Amended Complaints in state court. (Petitioner Enterprise VI App., 33a and Petitioner Erpenbeck App., 37).

Petitioners also cite *Connally v. General Const. Co.*, 269 U.S. 385 (1926), challenging the Oklahoma minimum per diem wage statute. The state stature was found to be invalid for lack of certainty as to the rate of regulated wages and the locality to determine that rate. Unlike Oklahoma's statute, Article 15 contains sufficient standards and criteria for available uses. It also provides a procedure through a public hearing process to resolve any ambiguity. In *Kawaoka v. City of Aroyo Grande*, 17 F.3d 1227 (9th Cir. 1994), *cert. denied*, 115 S.Ct 193 (1994), standards nearly identical to Article 15 were upheld as a matter of law for a land use regulation requiring a specific development plan. Requiring a specific development plan was constitutional as a rational planning device to coordinate development with infrastructure where large undeveloped tracts were proposed for development.

Petitioners' position has no similarity to *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994). There, denial of the fill permit under wetlands legislation denied all use. Instead, *Tabb Lakes, LTD. v. U.S.*, 10 F.3d 796 (Fed. Cir. 1993) applies and requires denial of further review. Citing *Lucas, Agins*, and *First English*, supra, the Court of Appeals found a discretionary wetlands fill permit denial was not a constitutional violation. In support the Court of Appeals quoted *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-127 (1985):

> "The mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. . . . A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense; After all, the very existence of a permit

system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. *Only when a permit is denied and the effect of the denial is to prevent "economic viable" use of the land in question can it be said that a taking has occurred."* (Emphasis added).

Kentucky's state courts correctly ruled as a matter of law that Petitioners were not entitled to relief. Then as now they could not sustain their burden of showing an entitlement to the only zoning approval denied. The C-2/PD regulation advanced legitimate government interest in land use planning and imposed no undue adverse economic impact on any protected investment backed expectation for the development as proposed. Nor can they show that Hyper would have purchased even if Boone Fiscal Court had approved the application. The record below is undisputed that Petitioners' development plan was not fully acceptable to Hyper. To make it more acceptable, the retail building had to be placed in the rear 9 acres zoned industrial. (App., *Infra,* 61a-66a; Petitioner Erpenbeck App. 29).

Other flaws fatal to Petitioners' 42 U.S.C. §1983 claims are ripeness and being time barred. Petitioners have not satisfied the "finality" prong of *Williamson Co. Regional Planning v. Hamilton Bank*, 473 U.S. 172 (1985). Without "finality" government decision making has not become a constitutional violation. Petitioners' facial claims assert the C-2/PD by its mere enactment violates their constitutional rights. The applicable statute of limitations for Petitioners' 42 U.S.C. §1983 claims is Kentucky's 1 year provision in K.R.S. 413.140(1)(a). *Wilson v. Garcia*, 471 U.S. 261 (1985) and *Collard v. Kentucky Bd. of Nursing*, 896 F.2d 179 (6th Cir. 1990).

In constitutional facial attacks, the statute of limitations commences immediately upon enactment. *National Advertising Co. v. City of Raliegh*, 947 F.2d 1158 (4th Cir. 1991) *cert. denied*, 112 S.Ct. 1997 (1992). Respondents enacted the C-2/PD zoning on Petitioners' property in 1986 and Petitioners participated in that county-wide zoning update. Petitioners commenced no action within the allowed time.

As part of the 1991-92 county-wide zoning update, that portion of Petitioners' property zoned C-2/PD was rezoned with no objection from Petitioners to C-4. This zoning classification allows over 30 commercial uses without PD review, with no user exceeding 100,000 square feet. Under either the C-2/PD or the current C-4 zoning, Petitioners' development plan could not be approved.

CONCLUSION

Respondents urge the Petitions for Certiorari be denied. Petitioners lacked a constitutionally protected property right to a development plan approval that violated existing zoning and conflicted with the comprehensive plan. They had no investment backed expectations for such a development. Petitioners present no special or important reasons giving rise to further review. Instead, Petitioners ask this Court to exercise a legislative function of local government. Simply stated, Petitioners' action depends on a zoning classification the property never had and presumes, without support, that

none of the hundreds of available uses would be approved. The Court of Appeals of Kentucky properly applied precedent of this Court and Petitioners present no unsettled question of federal law.

Respectfully submitted,

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(606) 371-7407

Counsel for Respondent,
Boone County
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LARRY J. CRIGLER
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Counsel for Respondent,
Boone County
Fiscal Court.

APPENDIX A

BUSALD FUNK ZEVELY, P.S.C.

ATTORNEYS AND COUNSELORS AT LAW

226 MAIN STREET
FLORENCE, KENTUCKY 41042–6910
606/371-3600 · 606/371-2300
TELECOPIER 606/525-1040

November 6, 1989

Mr. Paul J. Vesper
Attorney at Law
8100 Burlington Pike
Suite 400
P.O Box 576
Florence, KY 41042

Mr. Dennis J. Vesper
Enterprise VI
709 St. Joseph Lane
Covington, KY 41011

RE: Burlington Pike Property

Dear Mr. Vesper:

Per paragraph (17) of the CONTRACT FOR PURCHASE AND SALE between Enterprise VI and Erpenbeck Commercial Enterprises, Inc., dated July 21, 1989, this is to confirm that my client's wish to waive the contingencies set out in paragraph 11(A) of same.

Should you have any questions, please do not hesitate to call.

Very truly yours,

BUSALD FUNK ZEVELY, P.S.C.

/s/ Thomas R. Nienaber
Thomas R. Nienaber

TRN:mjk
Certified Mail, Return Receipt Requested
cc: Erpenbeck Commercial Enterprises, Inc.
4205 Dixie Highway
Erlanger, KY 41018

APPENDIX B

REAL ESTATE PURCHASE AGREEMENT

THIS REAL ESTATE PURCHASE AGREEMENT (hereinafter referred to as "Agreement") is made and entered into by and between ERPENBECK COMMERCIAL ENTERPRISES, INC., a Kentucky corporation (hereinafter referred to as "Seller"), HYPER SHOPPES, INC., a Delaware corporation (hereinafter referred to as "Buyer"), and THOMAS R. NIENABER, as Escrow Agent (hereinafter referred to as "Escrow Agent").

W I T N E S S E T H:

WHEREAS, Seller does hereby agree to convey to Buyer, who agrees to purchase from Seller, a 41(±) acre tract of real estate lying and being located on Kentucky Highway 18, Florence, Boone County, Kentucky said property being more particularly described and identified below; and

WHEREAS, it is understood and acknowledged by Buyer and Seller that Seller herein has contracted with various third parties for the purchase of the 41(±) acre tract of real estate, in addition to other adjoining acreage; and

WHEREAS, Buyer and Seller acknowledge that Seller's contract to purchase the subject real estate with said third parties is subject only to obtaining certain zoning approvals; and

WHEREAS, Buyer and Seller desire to enter into this Agreement for the purchase of the Property, subject to the following terms and conditions.

NOW, THEREFORE, in consideration of the foregoing premises and mutual promises and undertakings hereinafter specified, the parties hereby covenant and agree as follows:

1. PROPERTY

(a) Seller agrees to convey to Buyer, who agrees to purchase from Seller, an approximate 41(±) acre treat of real estate, lying and being located at Kentucky Highway 18, Florence, Boone County, Kentucky, said 41(±) acre tract of real estate, being outlined on the attached plat, identified as Exhibit "A", a copy of which is incorporated herein by reference. Said 41(±) acre tract shall hereinafter be referred to as the "Property".

(b) Seller shall within 30 days from the date hereof obtain, at Seller's cost, a survey and legal description of the Property, prepared by a registered Kentucky surveyor, certified to Seller, Buyer and, if requested by Buyer, Buyer's title insurance company. Such survey shall stake all boundary corners and indicate the location of rights of ways and easements and indicate the acreage located within the Property as well as the acreage encumbered by rights of way or easements within the Property.

(c) Buildings, structures or improvements presently located on the Property and all crops, crop bases, tobacco poundage allotments, standing timber, residential or any type of farming structure, or any and all other types of standing crops of improvements shall not be included in the Purchase Price and any and all such structures, improvements, crops, etc. as herein before stated, shall remain the sole and separate property of Seller provided, however, that any and all buildings, structures, standing crops, timber, etc. as herein before stated, shall be removed from the Property by Seller at Seller's cost and

expense prior to Closing. Any and all such improvements, structures, crops, timber, etc. left on the Property at time of Closing shall become the property of Buyer.

2. PURCHASE PRICE

(a) The purchase price to be paid by Buyer to Seller for the Property (hereinafter referred to as "Purchase Price") shall be a sum equal to the product of $120,000.00 multiplied by the number of acres (calculated to the nearest 1/100 of an acre and based on the survey obtained pursuant to Paragraph 1 above) contained within the Property net of acreage encumbered by easements or rights of way of record.

(b) The Purchase Price shall be paid by the Buyer to the Seller at closing in cash or certified or cashier's check, less the amounts of Earnest Money paid by Buyer to Seller as provided for herein. Payment of the Purchase Price shall also be subject to the Escrow Provisions set out in Paragraph 6 hereof.

3. Earnest Money

(a) Buyer shall deposit the following earnest money deposits (the "Earnest Money"): (i) at the execution hereof, an initial Earnest Money deposit in the sum of Fifty Thousand Dollars ($50,000.00), (ii) thereafter Buyer shall pay additional Earnest Money of Ninety Thousand Dollars ($90,000.00), said sum being payable in six (6) equal installments of Fifteen Thousand Dollars ($15,000.00) each, the first of such installments to be payable on or before September 1, 1989 with a like Fifteen Thousand Dollar ($15,000.00) payment on the first day of each month thereafter, until the entire additional Earnest Money of Ninety Thousand Dollars ($90,000.00) is paid in full, (iii) In the event that Buyer elects to

extend the Closing beyond February 28, 1990, and the zoning approval under Paragraph 5 has not been obtained, then Buyer shall make the additional Earnest Money deposits provided in Paragraph 4(b), below. The additional deposits under this Paragraph 3(a)(iii) are to be applied to the Purchase Price at Closing.

(b) All Earnest Money shall be deposited by Buyer to Thomas R. Nienaber as Escrow Agent and shall be in an interest bearing Earnest Money account at Florence Deposit Bank, Florence, Kentucky.

(c) In the event this transaction should close as provided for herein, then and in such event, the principal amount of Earnest Money paid under Paragraph 3 (except payments made under Paragraph 3(a)(iii)), shall be applied to the Purchase Price with all interest accrued on such Earnest Money being paid to the Seller and not applied to the Purchase Price. In the event that this transaction shall not close as provided for herein, then all Earnest Money and accrued interest shall be disbursed as provided in Paragraphs 4, 5, 8, 12 and 15 hereof.

(d) Thomas R. Nienaber shall serve as Escrow Agent for purposes of investing and retaining all escrow moneys paid herein by Buyer to Seller. Escrow Agent shall make all disbursements as provided for in Paragraphs 4, 5, 8, 12 and 15 hereof.

4. CLOSING AND CLOSING DATE

(a) The Closing shall be held on or before the later of (i) February 28, 1990, or (ii) 30 days after zoning approval has been obtained under Paragraph 5, subject to Buyer's estension rights under Paragraph 4(b), below.

(b) In the event that the Closing should not occur before February 28, 1990, Buyer shall have the right to extend the Closing Date, in Buyer's sole discretion, on a month to month basis until the later of February 28, 1991 or 30 days after Seller has obtained the zoning approval under Paragraph 5. Should Buyer make such election or elections to extend the Closing Date, Buyer shall pay a sum of Twelve Thousand Five Hundred Dollars ($12,500.00) for each calendar month or any portion thereof that the Closing Date is extended. Such extension payments shall be applicable to the Purchase Price at Closing. All additional monthly payments shall be due and payable on or before the first day of each calendar month for which Buyer elects to extend. Such $12,500 extension payments shall be made directly to Seller and not to the Escrow Agent if the zoning approval under Paragraph 5 has been obtained at the time such extension payment is due. In the event that Seller should institute any litigation and/or appeal from action taken by either the Boone County Planning and Zoning Commission and/or the Boone Fiscal Court regarding the application for approval of Concept Development Plan as provided for herein, then the Buyer shall have the right to extend this agreement and the Closind Date by paying to Escrow Agent, as additional Earnest Money, on the first day of each calendar month during such period of litigation and/or appeal the sum of Twelve Thousand Five Hundred Dollars ($12,500.00). If the within transaction should close after favorable resolutionof such litigation and/or appeal, then all such $12,500.00 payments and interest thereon shall be applied to the purchase price. If such litigation and/or appeal is not resolved in favor of Seller and this transaction is not concluded, all $12,500.00 payments made by Buyer to Seller during that period of litigation and/or appeal, and any interest

thereon shall be returned to the Buyer. Seller shall not be under any obligation to institute an appeal or any other litigation resulting from any action taken by the Boone County Planning and Zoning Commission and/or the Boone Fiscal Court and any decision made relative thereto shall be made by Seller in Seller's sole judgment and discretion.

(c) In the event that Buyer should fail to exercise its right to terminate this Agreement on or before February 28, 1990 or such later date as provided for in Paragraph 15,(a) and this transaction does not close on or before February 28, 1991 due to default of Buyer, then and in such event, all Earnest Money and accrued interest thereon, and any and all other additional sums paid to extend the Closing Date, shall become the property of Seller, free and clear of all claims and demands, which sum shall be considered as partial damages with Seller being reserved any and all other causes of action at law or equity including, but not limited to specific performance as provided for under Kentucky law.

MP
for
PAW

(d) At Closing, all nondelinquent real property taxes apportioned to the Property shall be pro-rated between Seller and Buyer, said proration to be based upon the most recent available tax valuation information, as provided by the Boone County Property Valuation Administrator. Seller shall be responsible for any recoupment of real estate taxes pursuant to KRS §132.452 applicable to the period prior to the Closing Date as a result of any agricultural valuation of the Property under KRS §132.450.

(e) Within thirty (30) days from the Buyer's receipt of the survey required under Paragraph 2, Buyer shall obtain a title commitment for the Property and Buyer shall notify Seller in writing as to any and all exceptions

to title shown by such title commitment or survey to which Buyer objects including, but not limited to easements, assessments, restrictions, and any and all other matters of record. Seller shall remove or cure such objectionable title exceptions to Buyer's satisfaction within 60 days after receipt of Buyer's objections. In the event that no objection is made by Buyer to Seller, with respect to a matter shown by the title commitment or survey, Buyer shall be deemed to have waived such exception and shall take title to the Property subject to the same.

(f) At Closing, Buyer and Seller agree to execute and deliver any and all papers as may be legally necessary to carry out the terms of this Agreement, including, without limitation:

(i) A General Warranty Deed executed by Seller, conveying fee simple marketable record title to the Property to Buyer, free and clear of all tenants rights , liens, easements, reservations, restrictions and encumbrances whatsoever, excepting only such matters as are disclosed by the survey and/or the title commitment described above and which are not objected to by Buyer.

(ii) An Owner's Affidavit in form acceptable to Buyer's Title Insurer.

(iii) Such documentation as may be reasonably required by Buyer's Title Insurer to evidence Seller's authority to convey the property to Buyer.

5. ZONING APPROVAL

(a) Buyer and Seller acknowledge and understand that, Seller shall be required to obtain various certificates of

approval from the appropriate Planning and Zoning regulatory bodies in Boone County, Kentucky for a Concept Development Plan permitting the construction of an approximately three hundred thirty-seven thousand (337,000) square foot retail building on the Property. The term "Concept Development Plan", as provided for herein, shall be defined and interpreted pursuant to the current Planning and Zoning Regulations of Boone County, Kentucky. Seller agrees to act diligently and in good faith and take all reasonable steps necessary to obtain the approval of a Concept Development Plan by the appriate Planning and Zoning Authorities in Boone County, Kentucky on or before February 28, 1990. Buyer agrees to reasonably cooperate and assist Seller in all reasonable ways in obtaining Concept Development Plan approval from the appropriate Planning and Zoning authorities in Boone County, Kentucky.

(b) Buyer and Seller will cooperate in the development of the Concept Development Plan to be submitted. Buyer shall provide Seller with its preliminary site layout by September 1, 1989 and Seller will submit a Concept Development Plan for consideration of the Boone County Planning and Zoning Commission at its October 4, 1989 meeting. Changes to the submitted Concept Development Plan will not be made without the consent of Buyer.

(c) In the event that Seller is unable to obtain approval of the Concept Development Plan and Buyer elects to terminate this Agreement pursuant to Paragraph 15, then and in such event, all Earnest Money and the interest thereon shall be refunded pursuant to Paragraph 15 with Buyer and Seller having no further legal obligations to the other by virtue of the terms and conditions hereof except as provided in Paragraph 5(f) below. Final

approval of the Concept Development Plan will not be deemed to have occurred until the Concept Development Plan with conditions acceptable to Buyer is adopted by the Boone County Planning Commission and a corresponding ordinance is adopted by the Boone County Fiscal Court and the time for appeal pursuant to KRS Section 100.347 has expired without an appeal being filed. Seller will promptly notify Buyer of the date of expiration of the appeals period (and, therefore, the date deemed to be final approval hereunder) and evidence of the approval.

MP for PAW

(d) Buyer shall be responsible to Seller for the payment of all necessary and reasonable costs incurred by Seller in order to obtain approval of the Concept Development Plan, provided that Buyer's liability for such costs and expenses shall not exceed One Hundred Fifty Thousand Dollars ($150,000.00). Upon execution hereof, Buyer shall deposit with Seller the sum of Fifty Thousand Dollars ($50,000.00) as partial payment toward the costs and expenses incurred by Seller in obtaining Concept Development Plan approval. On or before the first day of each month during the term of this Agreement, Seller shall provide Buyer an itemized listing of all costs and expenses incurred by Seller in obtaining Concept Development Plan approval. At such time as Seller depletes the initial Fifty Thousand Dollar ($50,000.00) cost and expense deposit, Buyer shall forthwith deliver to Seller an additional Fifty Thousand Dollars ($50,000.00) for the payment of all subsequent costs and expenses incurred. At such time as the second Fifty Thousand Dollar ($50,000.00) deposit for costs and expenses is depleted, Buyer shall deliver to Seller the third and final Fifty Thousand Dollar ($50,000.00) deposit for costs. All cost and expense

funds remaining on deposit with Seller at such time as the Concept Development Plan is approved shall be delivered by Seller to Buyer with a complete accounting of all costs and expenses incurred. Seller need not obtain Buyer's approval prior to expending any and all sums for costs incurred in obtaining approval of the Concept Development Plan. It is agreed by Buyer that Seller shall be entitled to use Seller's reasonable judgment and discretion in determining what costs should be incurred in obtaining Concept Development Plan approval, and that such reasonable judgment and discretion shall be final and not subject to contest or objection by Buyer. Buyer shall be reserved the right to recommend to Seller any expenditures which Buyer deems appropriate and necessary to obtain Concept Development Plan approval; however, such suggestions and requests shall not be binding upon Seller. In the event that Planning and Zoning Commission denies the Concept Development Plan, the costs of a lawsuit or other legal action to overturn such decision will be at Seller's sole expense. Seller shall not be required to pursue any litigation and/or appeal of any action taken by the Boone County Planning and Zoning Commission and/or Boone Fiscal Court unless Seller deems it appropriate in Seller's sole judgment and discretion.

(e) All costs incurred by Seller in obtaining Concept Development Plan approval shall not be considered or act as a credit to any portion of any Earnest Money or Purchase Price to be paid by Buyer to Seller, not to any charge for extending the Closing as provided for herein.

(f) In the event that Seller is unable to obtain approval of the Concept Development Plan, Buyer shall not be entitled to reimbursement of any and all such costs

or expenses incurred by Seller in obtaining approval of the Concept Development Plan; however, Buyer shall be entitled to all plans, designs and other work product prepared in connection with the Concept Development Plan.

6. SITE GRADING AND IMPROVEMENTS

(a) Seller shall, at its sole cost and expense, provide all grading services for the Property to meet all specifications and standards of the Buyer (as set forth in attached Exhibit B) and all site grading plans and elevations as mutually agreed upon by Buyer and Seller. Buyer shall be responsible for providing at its sole cost and expense all engineering and related services necessary in preparing all plans, specifications and standards regarding site grading requirements necessary to meet those requirements of Buyer. Buyer and Seller agree that within forty five (45) days following the execution hereof, Buyer and Seller shall mutually agree upon a Site Grading Plan setting forth all site grading elevations. Buyer and Seller acknowledge that the appropriate Planning and Zoning Authorities may require various conditions relative to site grading and that Buyer and Seller shall, as is reasonably practical, cooperate with and accommodate any and all such conditions as may be required.

(b) Seller shall, at its sole cost and expense, construct up to the Southwest Property line (that property line fronting on Kentucky Highway 18) all water mains, sanitary sewer lines and utility services with capacity necessary to meet all existing Boone County and Commonwealth of Kentucky building code requirements for the proposed building and as may be required by the appropriate Planning and Zoning Authorities. Seller shall be responsible for any assessments or similar charges (other

than customary tap-in fees) in connection with the installation of such facilities In no event shall Seller be required to extend any water mains, sanitary sewer lines, or other utility services onto and/or across the Property. If any such extensions are required as a condition of the Concept Development Plan approval, then and in such event, Buyer shall agree to assume the cost of such lines serving improvements on the Property and Seller will be responsible for the costs of any extensions necessitated to serve tracts other than the Property.

(c) Seller shall, also construct the following streets and roadways at Seller's sole cost and expense: (i) proposed Centennial Circle (in accordance with the Improvement Plan for Heritage Hill Industrial Center) and in accordance with the construction standards and requirements of the local governmental jurisdiction for the dedication and acceptance of streets); (ii) a two-lane access road from the East side of the property to Centennial Circle (as shown on Exhibit A) in accordance with the construction standards and requirements of the local governmental jurisdiction for the dedication and acceptance of streets; (iii) proposed four-lane roadway from Kentucky 18 along the entire west boundary of the Property, as shown on Exhibit A, in accordance with the Construction Standards and requirements of the local governmental jurisdictions for the dedication and acceptance of streets. Seller will cause the proposed streets and roadways to be dedicated to and accepted by the local government jurisdiction and Seller will grant easements to Buyer to use such streets until such dedication and acceptance.

(d) Seller shall not be responsible for any improvements on the Property other than as provided for above. In the event that any turn lands, traffic signals or other road construction or road improvements are required by

Planning and Zoning authorities to obtain Concept Development Plan approval, the costs will be borne as provided in Paragraph 7.

(e) Upon Closing, Seller shall begin all site grading work and other improvements required to be undertaken by Seller under this Agreement and complete all such work in accordance with the construction schedule attached hereto as Exhibit C. All such work will be undertaken in a good and workmanlike manner, will be diligently pursued and will be free of liens or claims for liens. At Closing, the sum of Six Hundred Thousand Dollars ($600,000.00) shall be withheld from the Purchase Price to be held in Escrow with Thomas R. Nienaber as Escrow Agent. Escrow Agent shall disburse such funds from time to time as the site grading and other construction progresses based upon draw requests signed by Buyer and Seller. Buyer agrees to sign all draw requests upon receipt from Seller of evidence that (i) payments are due to contractors for such site grading or other construction, (ii) lien waivers have been obtained for the payments to be made and (iii) that sufficient funds remain in such escrow to complete the Seller's site grading and other construction obligations hereunder. When Seller and Buyer have certified that all such Seller's work has been completed, Escrow Agent shall pay any remaining escrow funds to Seller. All Escrow Money provided for under this paragraph shall be held at Florence Deposit Bank in an interest bearing account and all accrued interest on said Escrow Money shall be shared equally by Seller and Buyer. If Seller defaults in its construction obligations, Buyer shall be entitled to all undisbursed Escrow Money and all interest on the Escrow Money without prejudice to any other claims which Buyer may have against Seller arising out of such default.

7. PLANNING AND ZONING CONDITIONS

(a) Buyer acknowledges that the appropriate Planning and Zoning authorities may require various conditions as a condition precedent to approval of the submitted Concept Development Plan. In the event that any such "conditions" are required for approval of the Concept Development Plan, such conditions shall be subject to Buyer's consent, which will not be unreasonably withheld.

(b) If turn lanes, traffic signals or other road improvements to KY 18 are required by the Planning and Zoning Authorities to obtain Concept Development Plan approval, then Buyer shall pay for the cost of any improvements to that part of KY 18 along the frontage of the Property. In addition, if the Planning and Zoning Authorities should require any turn lanes or road improvements to KY 18 on the East side of Centennial Circle Drive, Buyer shall be required to pay the cost thereof. The Seller will pay or cause the Commonwealth of Kentucky to pay for the cost of turn lanes at the intersection of KY 18 and the proposed 4-lane road West of the Property. The cost of any traffic signals at KY 18 and the proposed 4-land road west of the Property will be shared equally by Buyer and Seller. The cost of the traffic signal at KY 18 and Centennial Circle Drive will be paid by Buyer. The cost of extension of the proposed 4-lane road to the West of the property site, detention and retention basins and other off-site improvements required by the Planning and Zoning Authority shall be at Seller's sole cost and expense and Seller agrees to construct same as part of its construction obligations under Paragraph 6. Seller shall only be required to pay that portion of the cost incurred relative to such improvements as are actually constructed off-site i.e. on that

portion of the real estate not actually included in the 41 acre (±) tract defined in Exhibit A. Buyer agrees that it shall be responsible for all construction costs of any and all other such improvements including the extension of the 4-lane road, detention and retention basins and any and other site improvements which are situated directly on the Property.

8. CONTINGENCIES; CONTRACT RIGHTS

(a) Buyer acknowledges that at the present time, Seller is under Contract with various third parties for the purchase of the Property and other property comprising a two hundred fifty-four (254) acre (±) tract of real estate lying and being located at Kentucky Highway 18, Florence, Boone County, Kentucky. Seller agrees to perform under such contract and to use best efforts, including taking legal action and seeking specific performance, to enforce its rights to purchase the Property. In the event that Seller defaults hereunder due to thru no fault of the Seller its inability to conclude its purchase of the Property, then all Earnest Money, all accrued interest thereon and all extension fees paid by Buyer to Seller ~~for zoning costs~~ shall be returned to Buyer. If such failure to conclude the purchase is due to Seller's default, then Buyer shall also be entitled to a return of all zoning costs paid to Seller and Buyer shall have such remedies against Seller as provided at law or in equity.

MP for PAW

MP for PAW

MP for PAW

(b) Seller represents and warrants to, and covenants with Buyer that:

(i) Seller has an executed contract to purchase the Property with the fee title owner of the Property; that no default has occurred thereunder, that the contract is contingent only upon obtaining the

zoning approval contemplated by Paragraph 5, hereof obtaining clear title to the Property and obtaining court approval of the sale of a minor's interest in said real estate, and that Buyer will make all payments, give all notices and take all other actions necessary or appropriate to keep such contract in effect.

(ii) Seller will not (and will not enter into any agreement to or permit the owner of the Property to) convey, encumber or restrict the Property without first obtaining the written consent of Buyer.

(iii) To the best knowledge of Seller, the Property is not subject to any liens (other than regular installments of real estate taxes and mortgages in an aggregate amount not more than one Purchase Price, assessments, leases, unrecorded easements, options to purchase (other than Seller's rights and this Agreement), rights of first refusal or any other agreement or contract to use, lease or purchase the Property.

(iv) to the best knowledge of Seller, the Property has not been used for the manufacture, distribution, storage or disposal of any hazardous waste, hazardous substance or other pollutant (as those terms are defined by any federal or Kentucky law, statute or regulation) and no such hazardous wastes, substances or pollutants are located on the Property.

(c) This Agreement is contingent upon Seller obtaining approval from the Boone County Planning and Zoning Commission of the Concept Development Plan as more particularly described in Paragraph 5. In the event that

this approval is not obtained for any reason other than the negligence or willful non-cooperation of either party, then, subject to Paragraph 4 and 15, hereof, this Contract shall become null and void with neither party having any obligation to the other than all Earnest Money shall be paid to the respective parties as provided for in Paragraphs 4 and 15.

9. POSSESSION

(a) Seller shall delivery to Buyer full and exclusive possession of the Property at Closing, subject only to Seller's right to enter the Property for the purpose of performing all Site Gradin Excavation, as provided for in Paragraph 6. Any crops, timber, structures, or other improvements on the Property not removed prior to Closing shall be deemed to be abandoned by Seller.

MP
for
PAW

(b) Within ~~30~~ 60 days from the date hereof, Seller will furnish Buyer, at Seller's sole cost and expense, with a report of an environmental engineer certifying that the Property is free of all hazardous wastes, substances or other pollutants.

(c) Seller grants to Buyer the right to enter into the Property (which right Seller has under its contract to purchase the Property) to conduct inspections, surveys and tests of the Property.

10. REAL ESTATE COMMISSION

Buyer and Seller acknowledge that neither has obtained nor retained the services of any real estate broker or real estate agent for which any real estate commission would be due and owing as a result of the real estate closing contemplated herein. Buyer and Seller agree to indemnify and hold the other harmless for any

real estate commissions so charged against the respective parties by virtue of any agreement or contract which they may have with any real estate broker or real estate agent.

11. NOTICES

Any notices which are permitted or required hereunder shall be in writing and shall be deemed to have been duly given as of the date and time the same are personally delivered, delivered by overnight delivery service; or deposited with United States Postal Service, postage prepaid, to be mailed by registered or certified United States Mail, return receipt requested and addressed to the following:

TO THE SELLER:	Erpenbeck Commercial Enterprises, Inc. Attn.: Mr. Ronald Erpenbeck 4205 Dixie Highway Elsemere, Kentucky 41018
TO THE BUYER:	Hyper Shoppes, Inc. Attn.: Mr. Pierre Wevers 4450 Eastgate Blvd. Cincinnati, Ohio 45245
TO ESCROW AGENT:	Thomas R. Nienaber, Esq. Busald Funk Zevely, P.S.C. 226 Main Street Florence, Kentucky 41042

or to such other address as either party hereto shall, from time to time, designate to the other party by Notice in writing as herein provided.

12. ESCROW AGENT

Thomas R. Nienaber joins in the execution of this Agreement for the express purpose of (a) acknowledging

receipt (subject to collection) of the Earnest Money deposit lodged by Buyer with Escrow Agent hereunder; and (b) agreeing to be bound by the provisions set forth in this Agreement with respect to the disbursement of the Earnest Money. Buyer and Seller hereby authorize the disbursement and delivery of the Earnest Money in accordance with the terms and provisions set forth in this Agreement. If, however, in the sole discretion of the Escrow Agent, some doubt exists as to when, whom or under what circumstances such Earnest Money shall be disbursed hereunder, and the parties hereto are unable after ten (10) prior written notice thereof from Escrow Agent to agree and direct Escrow Agent in writing as to when, whom or under what circumstances Escrow Agent shall disburse same, Escrow Agent shall be entitled to interplead said Earnest Money into the Boone Circuit Court without further liability or responsibility on its part. Costs, expenses and attorney fees incurred by Escrow Agent in connection with any such interpleader may be deducted by Escrow Agent from the amount of the Earnest Money prior to its deposit into the registry of the Court. In any event, however, all parties agree that Escrow Agent shall have no liability or any further responsibility to any party or person whomsoever for any disbursement of the Earnest Money made by Escrow Agent in good faith, unless such disbursement shall constitute a willful breach of the duties and obligations of Escrow Agent under this Agreement or gross negligence on the part of Escrow Agent. It is acknowledged by Buyer that the services of Thomas R. Nienaber rendered by him in his capacity as Escrow Agent shall not be construed as a conflict of interest and that Thomas R. Nienaber is in fact counsel for Seller herein. Buyer further acknowledges that the representation of Thomas R. Nienaber with respect to the Seller herein shall continue

after the closing hereof and that such continued representation shall not be construed as a conflict of interest by virtue of those services rendered as Escrow Agent.

13. TERM OF OFFER

This Agreement has been executed first by Seller as a continuing offer to sell the Property, subject to and conditioned upon the terms and conditions herein cotained, which offer shall be open for acceptance by Buyer until 6:00 o'clock p.m., August 20th , 1989, at which time the offer shall be deemed to be withdrawn. MP for PAW

14. AUTHORITY

Each of the undersigned hereby warrants and represents that he is authorized to execute this Agreement on behalf of the entity whose name he is signing under, and that his signature shall be binding upon such entity. Buyer and Seller acknowledge by the execution hereof, that all corporate action has been taken pursuant to and by duly authorized and adopted resolution of their respective Boards of Directors.

15. TERMINATION

(a) Buyer shall be reserved the option to terminate this Agreement for any reason, in Buyer's sole discretion and judgment, prior to the later of February 28, 1990 or 30 days after Seller has obtained the zoning approval pursuant to Paragraph 5.

(b) In the event that the Buyer should so elect to terminate this Agreement then:

(i) If Buyer elects to terminate this Agreement prior to February 28, 1990, and planning and zoning approval

for the submitted Concept Development Plan has not been obtained at the time of termination, then and in such event, Buyer shall be refunded all Earnest Money and accrued interest.

(ii) If Buyer should elect to terminate this Agreement after February 28, 1990 but prior to the time that Seller has obtained the zoning approval pursuant to Paragraph 5, then and in such event, Escrow Agent shall pay to Buyer all of the Earnest Money paid to date, with all accrued interest thereon.

(iii) If Buyer exercises this option to terminate and Seller has obtained the required zoning approval at the time of termination, then Escrow Agent shall pay to Seller and Seller shall be entitled to retain as its sole and separate property, all of the Earnest Money paid to date, with all accrued interest thereon.

(c) At the time of termination and distribution of the Earnest Money as provided for in Paragraph 15(a) and (b), this Contract shall become null and void with neither party having any further obligation to the other. All costs and expenses incurred by Seller in order to obtain approval of the Concept Development Plan shall not be reimbursed to Buyer by Seller; however, any all remaining moneys held by Seller to be applied to costs and expenses shall be immediately refunded to Buyer.

(d) In the event that Buyer should fail to terminate this contract as provided for in Paragraph 15(a) and planning and zoning approval under Paragraph 5 is obtained, Buyer shall be bound by the terms and conditions hereof and Seller shall be reserved any and all causes of action against Buyer including but not limited to retention of all Earnest Money and extension monies paid by Buyer to Seller plus all accrued interest; specific

performance; and any and all other causes of action as reserved Seller under Kentucky Law.

16. BINDING EFFECT

This Agreement shall be binding upon the respective parties, their successors, heirs and assigns. This contract may be assigned by the Seller or the Buyer provided that any such assignment will not release the parties of any liability hereunder.

17. GENERAL PROVISIONS

No failure of either party to exercise any power given hereunder or to assist upon strict compliance with any obligations specified herein, and no customer practice at variance with the terms hereof, shall constitute a waiver of either parties right to demand exact compliance with the remaining terms and conditions hereof. This Agreement contains the entire Agreement of the parties hereto and that no representations, inducements, promises or Agreements, oral or otherwise, between the parties not embodied herein, shall be of any force or effect. Any amendment to this Agreement shall not be binding upon the parties hereto unless the such amendment is in writing and executed by all the parties. The provisions of this Agreement inure to the benefit of, and be binding upon the respective parties, their heirs, administrators, executors, personal representatives, successors and assigns. Time is of the essence of this Agreement. This Agreement shall be interpreted under the laws of the Commonwealth of Kentucky.

Seller's election to retain any and all Earnest Money in the event of default by Buyer shall not act as or constitute a waiver of any and all other remedies available to Seller under Kentucky Law in the event of breach of this

Agreement by Buyer. The return of Earnest Money to Buyer in the event of default by Seller shall not act as or constitute a waiver of any and all other remedies available to Buyer under Kentucky Law in the event of breach of this Agreement by Seller.

18. SURVIVAL OF OBLIGATIONS

The covenants, representations and warranties set forth in this Contract shall survive any Closing under this Contract.

IN WITNESS WHEREOF, Seller has caused this Agreement to be executed by and through its president, Ronald Erpenbeck, pursuant to duly authorized and adopted resolution of its Board of Directors this ___ day of _____, 1989.

ERPENBECK COMMERCIAL ENTERPRISES, INC.

By /s/ Ronald Erpenbeck
Ronald Erpenbeck, President

Dated: 8/17/89

COMMONWEALTH OF KENTUCKY)
) SS:
COUNTY OF BOONE)

SUBSCRIBED, sworn to and acknowledged before me by the said Ronald Erpenbeck, President, Erpenbeck Commercial Enterprises, Inc., acting pursuant to duly authorized and adopted resolution of its Board of Directors this 17 day of August, 1989.

/s/
Notary Public

My Commission Expires: 5/25/91

IN WITNESS WHEREOF, Buyer has caused this Agreement to be executed by and through Pierre Albert Wevers, its Executive Vice President pursuant to duly authorized and adopted resolution of its Board of Directors this 17th day of August, 1989.

HYPER SHOPPES, INC.

By /s/

Dated: August 17, 1989

STATE OF Ohio)
) SS;
COUNTY OF Clermont)

SUBSCRIBED, sworn to and acknowledged before me by the said Pierr Albert Wevers, Executive Vice President of Hyper Shoppes, Inc. acting pursuant to duly authorized and adopted resolution of its Board of Directors this 17th day of August, 1989.

/s/ Janice K. Dean
Notary Public
My Commission Expires: 1-1-92

APPENDIX C

DEED

KNOW ALL PERSONS BY THIS INSTRUMENT:

That ERPENBECK COMMERCIAL ENTERPRISES, INC., a Kentucky Corporation,

the GRANTOR(S), for and in consideration of One ($1.00) Dollar and other good and valuable consideration as certified to below, paid to the GRANTOR(S) by the GRANTEE(S) herein, the receipt of which is hereby acknowledged, do(es) bargain, sell and convey to the following named GRANTEE(S),

WACO OIL COMPANY, INC., a Kentucky Corporation, its

successors and assigns forever, the following described real estate, in the county of BOONE, and state of KENTUCKY, to wit:

Street Address: Kentucky 18, Boone County, Kentucky

Grantee(s) Address: 119 Gerard Street, Covington, Kentucky 41011

Grantor(s) Address: 4205 Dixie Highway, Elsmere, Kentucky 41013

Z & S: _____ Group: 2026

Located in Boone County on the east side of Ky. 18 approximately 0.7 miles southeast of the intersection with Ky 237 and being more particularly described as follows:

Beginning at a point in the east right of way of Ky 18, said being 110 feet right of Station 158+78 and a corner with Lee Vesper, Trustee, thence with Vesper N 76-02 E. 1027.25 feet to a point; thence with a new division line S 13-58 E, 272.99 feet to

a point in the center of a proposed roadway; thence with the proposed centerline S 66-21-14 W, 131.72 feet to a P.C. of a curve; thence with the curve to the right 129.22 (R=300.00 delta = 24-40-46) to a point; thence N 88-58 W, 143.54 feet to a P.C. of a curve; thence with the durve to the left 130.91 feet (R=500.-- delta = 15-00) to a point; thence S 76-02 W. 163-47 feet to a P.C. of a curve; thence with the curve to the left 87.63 feet (R=125.00 delta = 40-10) to a point; thence S 35-52 W. 21.59 feet to a point on the east right of way of Ky 18; thence with said right of way N54-48-25 W. 368.00 feet to the point of beginning.

Containing 5.50 acres.

BEING the same property conveyed to the Grantors herein by deed from BARRY J. WILLIAMS and SERAFINA S. WILLIAMS, husband and wife, dated August 1, 1989, and recorded in Deed Book 418, page 266 of the records in the Boone County Clerk's Office at Burlington, Kentucky.

* * *

[Plat Map Omitted in Printing]

* * *

Together with all the privileges and appurtenances to the same belonging. To have and to hold forever the same to the GRANTEE(S), in the fashion and manner stated above in the conveying clause, with covenants of general warranty, except all taxes and assessments due and payable in the year 1993, which are to be reasonably prorated as of the date of closing and which the GRANTEE(S) assume(s) and agree(s) to pay.

GRANTOR and GRANTEE both certify, under oath, that the consideration of $530,000.00 is the full con-

sideration paid for the property and GRANTEE joins in this deed for the sole purpose of making this certificate about the consideration.

Dated this 29th day of January, 1993.

GRANTOR:

ERPENBECK COMMERCIAL ENTERPRISES, INC.,
a Kentucky Corporation

By: /s/ Ronald Erpenbeck
RONALD ERPENBECK, President

GRANTEE:

WACO OIL COMPANY, INC.,
a Kentucky Corporation

By: /s/ Dan Conrad Pres.
NAME AND TITLE

STATE OF KENTUCKY, COUNTY OF BOONE (GRANTOR)

The foregoing instrument was sworn to and acknowledged before me this 29th day of January, 1993, by RONALD ERPENBECK, President of ERPENBECK COMMERCIAL ENTERPRISES, INC., a Kentucky Corporation, for and on behalf of the Corporation.

/s/ Lori Jean Fields Lee
Notary Public
My commission expires: 6-25-93
My jurisdiction is: STATE AT LARGE

STATE OF KENTUCKY, COUNTY OF BOONE (GRANTEE)

The statement about consideration in the foregoing instrument was sworn to and acknowledged before me

this 29th day of January, 1993 by Dan Conrad, President of WACO OIL COMPANY, INC., a Kentucky Corporation, for and on behalf of the Corporation.

/s/ Lori Jean Fields Lee
Notary Public
My commission expires: 9-25-93
My jurisdiction is: STATE AT LARGE

This instrument prepared by Ziegler & Schneider, P.S.C., Attorneys at Law, 200 Covington Mutual Building, 629 Madison Avenue, Covington, Kentucky 41011, by Lori Jean Fields Lee, Attorney.

This conveyance has been authorized by Resolution of the Board of Directors of Grantor and the person(s) signing on behalf of Grantor have also been authorized to do so.

The Grantors herein hereby adopt the convenience plat attached hereto and incorporated herein by reference.

Subject to conditions, restrictions and easements contained in deeds and instruments of record.

STATE OF KENTUCKY,)
) Sct.
COUNTY OF BOONE,)

I, JERRY W. ROUSE, Clerk of the County Court in and for the county and state aforesaid, do hereby certify that the foregoing is a true and correct copy of the original on record in Deed Book, 501, Page 265-268 records of the Boone County Clerk's Office.

Given under my hand and official seal, this the 21 day of March, 1995.

JERRY W. ROUSE, Clerk
By: D. Lope, D.C.

APPENDIX D

BOONE COUNTY PLANNING COMMISSION
BUSINESS MEETING
Ellis Cooperative Extension Center
January 18, 1995
8:00 P.M.

Mr. William Viox, Chairman, called the meeting to order at 8:15 P.M.,

COMMISSION MEMBERS PRESENT:
Mrs. Judy Arnett
Mr. William Bailey
Mr. Fred Burch, Vice Chairman
Mr. Phil Damstrom
Mr. Robert Kirby, Jr.
Mr. Gayle McElroy
Mr. Don McMillian
Mr. Bob Millay
Mr. Barry Neltner
Mr. Robert Ries
Mr. Ralph Rush
Mrs. Linda Schaffer
Mrs. Carol Smith, Secretary/Treasurer
Mr. William Viox, Chairman
Mr. Earl White

All members were present.

LEGAL COUNSEL PRESENT:
Mr. Dale Wilson

STAFF MEMBERS PRESENT:
Mr. Kevin Costello, AICP, Executive Director
Ms. Jan Hancock, Secretary

Mr. Robert Jonas
Mr. Mitch Light
Mr. Kevin Wall

Approval of the Minutes:

Chairman Viox stated that each Commission member had received copies of the Minutes of the January 4, 1995 Public Hearings and Business Meeting. He asked if there were any comments or corrections.

There being no changes to the Minutes, Mr. McMillian moved that the Minutes be approved as mailed. Mrs. Smith seconded the motion and it carried unanimously.

UNFINISHED BUSINESS:

1. *Zoning Map Amendment*

   The request of *ERPS, Inc. (applicant)* for *ERPS, Inc., W. Thomas and Catherine Erpenbeck, Raymond and Carole Erpenbeck, Ronald and Patricia Erpenbeck, and Lawrence and Barbara Erpenbeck (owners)* for a Zoning Map Amendment on a 466-acre site located on both sides of U.S. 42 and on the north side of Mt. Zion Road, Florence and Union, Kentucky. The request is to rezone the site from Suburban Residential One (SR-1) to Residential Planned Development (RPD) and Commercial Two/Planned Development (C-2/PD) in order to allow a mixed use residential/commercial development, Plantation Pointe.

   Staff Member Kevin Wall read the Committee Report which recommended approval of the request based on the findings of fact, but subject to conditions (See Committee Report). Mr. Wall offered to review any of the changes in the project.

Mr. Barry Neltner, Committee Chairman, stated that it has taken quite a while to get to this point. He thanked Mr. Ray Erpenbeck for working with the Committee through the process.

Mr. McMillian asked if the new highway conflicts with the plan. Mr. Wall advised that it does not.

Chairman Viox asked if there were any comments from the applicant. Mr. Ray Erpenbeck stated that he appreciated working with the Committee. Chairman Viox thanked Mr. Erpenbeck for bringing the plan before the Commission. He stated that it is an excellent plan and he looks forward to Plantation Pointe.

Mr. Burch moved by resolution to the cities of Florence and Union to approve the request based on the Staff and Committee Reports including the conditions. Mr. Neltner seconded the motion.

Mrs. Schaffer stated that the Committee did a very good job. She questioned if the single-family attached, carriage homes, and condominiums are to be owner occupied. She does not want them to apply for multi-family, which could be four families that own. Mr. Ray Erpenbeck stated that the attached single-family residences and the carriage homes will be owner occupied. Mrs. Schaffer asked if this should be stated in the conditions. Mr. Wall replied "no". Mrs. Schaffer stated that it is important. Mr. Costello stated that it is implied in the application, all of the information submitted, and in the testimony. He stated that the apartments refer to the multi-family section only, which was discussed at length before the full Committee.

Counselor Wilson asked if the applicant would agree to submit a letter, to be included as part of the Devel-

opment Plan, stating that single-family attached and condominiums will be owner occupied. Mr. Erpenbeck replied "I will do that".

Mrs. Schaffer questioned if the project stops if some of the conditions do not occur. Counselor Wilson advised that, depending on the condition, that is probably correct. He noted that there is a condition that the road has to be all the way built thru before a Certificate of Occupancy can be issued. He stated that when a zone change is approved subject to a Concept Development Plan and a condition is not followed thru, the statutes say that the zone change is not lost and the property does not revert back to the prior zoning without having a Public Hearing to determine whether failure to meet that condition would cause that to happen.

Mr. Costello stated that with Oakbrook and Triple Crown, the conditions have been looked at as each phase comes on line, which will be done in this case. Mr. Wall reviewed Condition #16 in this regard.

Mrs. Schaffer referred to Condition #3 and questioned areas 11 A, B, and C. Mr. Wall indicated those three commercial areas on the plan. He stated that through the Committee review process, there was a general consensus that commercial uses should become much more limited in range of uses and intensity the further west they go. He stated that Mr. Erpenbeck divided Area 11, which is located along U.S. 42, into three areas (11 A, B and C) and prepared use lists (which are attached to the Committee Report). Mr. Burch stated that it was agreed that everything from the main road coming in on 11 B and C would be O-1 uses. Mr. Wall agreed and added that Area 12 was proposed to be generally C-2 uses, and Area 3 was to be

generally C-1 uses. He stated that Area 11 is normally what is included in C-2, with some exclusions. Area 3 is what is in C-1 with the exception that the intensity has been limited to 10,000 square feet per acre. Areas 11 B and C have been combined to allow O-1 uses for the area between the collector road and the western boundary of the site. Area 12 is a combination of C-1 and O-1 uses.

Mrs. Schaffer stated that it is not in the letter that 11 B and C will be O-1 uses. Mr. Wall referred to Condition #3 which indicates how the use lists apply. He stated that the Committee did not have a problem with the use lists and the concern was the parts of the project they were being applied to. Mrs. Schaffer stated that Condition 3. B. says that the allowed uses for Areas 11 B and 11 C "shall be exclusively those listed in the applicant's letter . . .". Mr. Wall stated that they are using the list, but putting the uses towards different parts of the development. He stated that the uses will be O-1 only.

Mr. Kirby noted Mrs. Schaffer's comments regarding the single-family and detached homes being something other than owner occupied, and that the applicant agreed to provide a letter stating that they would be owner occupied. He asked if an owner would be precluded from renting the home in the future while it was on the market for sale. Counselor Wilson explained that the owners would occupy the dwellings and not purchase them solely for investment purposes. Mr. Kirby stated that the restriction would apply to the first time the home is purchased. Counselor Wilson stated that that would be a fair answer to the question.

Mrs. Smith questioned the location of the land to be donated for the school. Mr. Erpenbeck indicated an area shown in orange on the plan. Mr. Neltner stated that there was a lot of discussion in regard to the school site. He stated that the depth of the commercial and office areas is approximately 400 feet and the way the ground lays, the school will have visibility from U.S. 42. Mrs. Smith stated that the visibility was her concern.

Mr. Ries stated that the Committee and Mr. Erpenbeck did an excellent job working together on this project and he commended them both.

There being no further comments, Chairman Viox asked for a vote on the motion made by Mr. Burch and it carried unanimously. Counselor Wilson advised interested parties to follow up with the Union and Florence city councils as they have the final say.

Mr. McElroy left the meeting at this time.

2. *Utilization of an Underlying Zone in a Planned Development*

The request of *Gary Gregory and Brad Denzia (applicants)* for *Matthias and Laverne Toebben (owners)* for the Utilization of an Underlying Zone in a Planned Development in order to construct an 8,800 sq. ft. AutoZone auto parts/accessory store on a 1.1-acre parcel located at Highway 42 and Old Toll Road, Florence, Kentucky. The site is zoned Commercial Two/Planned Development (C-2/PD).

Staff Member Bob Jonas read the Committee Report which recommended approval of the request based on the findings of fact, but subject to conditions (see Committee Report).

Mr. Kirby moved by resolution to the Florence City Council that the request be approved based on the Staff and Committee Reports. Mr. Bailey seconded the motion.

Mr. Ries stated that on the original plan the area in front of the dumpster was considered a loading area. He asked if it is still a loading area. Mr. Jonas advised that it is still a loading area, but shipping and receiving will be done after hours. Mr. Ries asked what it will look like. Mr. Jonas stated that it is a one-bay garage.

APPENDIX E

COMMITTEE REPORT

TO: Boone County Planning Commission

FROM: Barry Neltner, Chairman

DATE: January 3, 1990

RE: Request of *Erpenbeck Commercial Enterprises, Inc. (applicant)* for *Enterprise VI or Dennis Vesper and Alicia Vesper (owners)* for the Utilization of an Underlying Zone in Planned Development on a 43.45 acre site located on the north side of KY 18 and east of Limaburg Creek Road, Boone County, Kentucky. The site is currently zoned Commercial Two/Planned Development (C-2/PD). Boone Crossing, a 447,600 square foot retail center, is being proposed.

REMARKS:

We, the Committee, recommend denial of the request based upon the following statements and findings of fact.

FINDINGS OF FACT

CONCEPT DEVELOPMENT PLAN

1. The proposed uses and building density as stated on the submitted Concept Development is not consistent with Article 15 of the *Boone County Zoning Regulations* and the criteria used to evaluate Planned Development (PD) requests under the applicable regulations.

   a. The submitted Concept Development Plan, proposed uses and design are not innovative nor do they offer a mixed-use of a substantial value than

would be normally allowed under conventional zoning requirements as stated in the *Boone County zoning Regulations*.

The proposed uses and scale of development are not appropriate given the nature of the adjoining residential and small scale commercial land uses and zoning either existing or planned for the Florence-Burlington (KY 18) corridor. The proposed type and scale of commercial uses are not presently located along KY 18 from Houston Road to Burlington (the governmental center) nor are they proposed or planned for the future.

b. As stated in the *Boone County Zoning Regulations*, the Commercial Two (C-2) underlying zoning district serves as a reference point to determine permitted uses if the other requirements of Planned Development (PD) are met. The submitted plan and proposed uses and their intensities do not meet the other requirements stated in Article 15. These requirements include but are not limited to building dimensional standards, a more useful pattern of open space, a development pattern which utilizes the natural topography, a more efficient use of the land and a development pattern in harmony with land use densities, transportation facilities, community facilities and the objectives of the Comprehensive Plan.

c. The submitted Concept Development Plan does not demonstrate a development pattern which preserves and utilizes the natural topography, scenic vistas (KY 18 corridor), trees and prevents the disruption of natural drainage patterns as required in Planned Development (PD). The Plan is over 90 percent impervious cover, either building or pavement from parking, circulation or loading areas.

The submitted Concept Development Plan shows no landscaping features, or the retention of existing vegetation, to soften the tremendous visual impact of the paved parking area from public view (KY 18). To further illustrate this point, the submitted Concept Development Plan indicates only a 10 foot non-paved area between the KY 18 right-of-way and the interior ring road to screen the extremely large parking area located in front of the proposed retail center. In addition, due to the scale or size of the project and existing topography of the site, massive earthwork will be required to cut and fill the site. Consequently, the natural drainage system of the site will be disrupted and will be relocated off the site.

The proposed uses and location of the uses severely impact the site's physical assets. No attempt was made to rearrange the proposed uses to preserve the existing heavily wooded area on the site. The submitted request did not take into consideration the visual impact of the loss of this wooded area or the public view of the large parking areas in front of the retail center.

d. The proposed uses and submitted Plan do not fit the development pattern in harmony with land use density, transportation facilities, community facilities and objectives of the Comprehensive Plan. The applicant has indicated that the building intensity of the proposed project is 9,266 square feet per acre. This intensity was derived by combining the acreage of the C-2/PD zoned property and the I-1 zoned property. The correct building intensity is approximately 12,862 square feet per acre or 447,600 total square footage located on approxi-

mately 34.8 acres zoned C-2/PD. This figure is considered to be very intense in terms of the adjoining commercial uses. The Heritage Hill Industrial Center Subdivision was approved at an intensity of 6,447 square feet per acre.

e. The proposed development will have a tremendous impact on the existing roadway network (KY 18 and KY 237) extending from I-75 and I-275. The existing traffic volume on KY 18 at the site location is approximately 2,342 vehicles per hour at the P.M. Peak Hour, (from applicant's TIA, Figure 5) The total amount of traffic estimated to be generated by the development at full build out (again from the applicant's TIA, Table 3) is 2,929 trips. The amount of traffic generated by the proposed development compared to the existing traffic volume of KY 18 is significant. The traffic generated by the proposed development has the potential to double the existing amount of traffic on KY 18 during the most heavily traveled hours. This would greatly decrease the capacity of KY 18 which is needed for future development of Boone County. The intent of the Access Management Regulations is to ". . . permit reasonable speeds and economy of travel while maintaining the capacity of the roadway. . .". Overall, the submitted Concept Development does not demonstrate the combination of various land uses, innovation of physical design, and the inter-relationship with the land uses in the surrounding area to justify the deviation from standard district regulations.

BOONE COUNTY COMPREHENSIVE PLAN

2. The Proposed uses and submitted Plan are not in agreement with the 1989-1990 Goals and Objectives of the *Boone County Comprehensive Plan.*

Overall Objective

> "Residential, commercial, industrial and institutional uses can co-exist provided proper design principles are applied in developments to minimize frictions created by activities of whatever diversity."
>
> "The future growth and the redevelopment of areas shall be accompanied by adequate infrastructure and services."

Because of its scale and its expected impact on the community, the proposed development would require significant road and utility improvements in order to support the retail portion of this site. The applicant has failed to provide the assurance that these improvements will be made.

Environment

The project as proposed contradicts one of the Environment objectives of the Comprehensive Plan.

> "New development shall be designed in harmony with the physical environment in such a way that each site's existing physical assets are used beneficially."

Due to the scale of the project, the site's assets (e.g. trees, drainage swales, and existing topography) will have to be completely removed including the possible the Silvery Salamander and the Running Buffalo Clover.

Business Activity

> "Appropriate locations for industries or businesses compatible with others located in Boone County are provided."

The scale of the proposed use conflicts with adjoining smaller scale and less intense commercial uses and existing businesses located along KY 18. The Committee believes there are other more appropriate locations in Boone County for the proposed regional development as stated in the Comprehensive Plan.

The proposed project also conflicts with a commercial objective of the Business Activity Element. Large scale mixing of commercial and non-commercial uses shall occur in Planned Developments only when consideration can be given to assure compatibility with surrounding land uses. The proposed design of the commercial center suggests only large scale retail uses instead of providing professional office and service related uses needed for the nearby residential population and the eventual industrial development located directly north of the site.

Transportation

The applicant has not adequately addressed the traffic impact the proposed project will have on the existing transportation network in Boone County. Specifically, the transportation concerns raised at the Public Hearing relating to a increase in the number of traffic accidents along KY 18, and a decrease in the level of service at intersections have not been resolved. The Comprehensive Plan discusses the need for access management and to protect the traffic capacity of major roads like KY 18 in Boone County.

3. The proposed uses and submitted Plan are not in agreement with the 1986 *Boone County Comprehensive Plan.*

   a. The Comprehensive Plan describes areas of future commercial activity. The primary focus of commercial activity is and will remain in the future in Florence. The City of Florence, because its location to the interstate road system and access is well suited for the expansion and the retention of commercial businesses with a regional draw. Page B-14 of the Land Use Element describes this type of activity.

> "Since the immediate Florence area figures so prominently in the County's commercial activity, this region has the momentum to continue dominating construction of commercial structures. Many problems with the location and arrangement of commercial enterprises have emerged, however, especially along KY 18 and US 42. Along KY 18 in the I-75/Mall Road/Houston Road area, there are many traffic problems that can be worsened by adding commercial access points. The land surrounding the U.S. 42 area south of Florence, will experience additional growth towards the City of Union. Any commercial developments in these areas should be limited in scale and clustered to serve growing residential neighborhoods. Ideally, these commercial clusters should not function as an extension of Florence and Mall Road, but as a distinct unit serving the Union area. This should apply to the Limaburg area as well. The commercial development in this area should coordinate closely

with the projected high and medium density residential development to form a more coherent community rather than just a strip extending out of Florence."

Specifically, commercial uses in the Limaburg/KY 18 area or the project area should not be similar in nature and scale as to the type located on Mall Road.

b. In the Transportation Element of the Comprehensive Plan, there is a reference to the construction a road across Airport property to connect Mineola Pike with KY 18. Such a road would alleviate existing and potential traffic problems by providing alternate transportation routes for the public. As stated at the Public Hearing and in a letter from the Kenton County Airport Board and the Federal Aviation Administration (see attached letters), this road is not constructed nor is it planned to be constructed in the future. It is obvious that the "effective and efficient use of highway facilities" will not occur without the construction of the road.

c. The text of the Land Use Element of the Comprehensive Plan suggests that the "KY 18 corridor will be a mixture of all types of development." In addition, the proposed scale of the project and regional focus contradicts the text of the Land Use Element, which stresses that the "Mall Road area will continue to grow as a regional shopping area and its spill over onto US 42, KY 18 and Houston Road will be evident, thus, needs to be substantially controlled." Consequently, the design and location of the KY 18/I-75 Interchange, US 42/I-75 Interchange, and the new Mall Road/I-75 Interchange encourages the location of large scale retail regionally focused development to be confined to the Mall Road area. The

Comprehensive Plan discusses the importance of limiting regional retail development to select areas. The Comprehensive Plan states that "regionally oriented commercial development, should be retained to the Mall Road area." The basis for this statement is the current trend of this type of commercial development occurring there now and the introduction of the I-75/Mall Road Interchange to serve this type of development. This is well documented in the Comprehensive Plan. The Comprehensive Plan also notes the existing and potential traffic problems on KY 18 and recognizes that these problems can be worsened if regionally oriented commercial or retail uses similar to the existing retail businesses along Mall Road are built along KY 18. In addition, KY 18 is the main artery to Burlington and the existing and future planned growth of Boone County. Even though the I-75/Mall Road Interchange is planned to reduce some of the existing traffic congestion problems on KY 18 and Mall Road, it was not designed to alleviate future trips related to growth along KY 18 towards Burlington.

LAND USE COMPATIBILITY

4. The proposed project and its regional orientation at this location as stated, and depicted graphically in the applicant's traffic study is not appropriate given the site's location from I-75 (approximately 2 miles) and from I-275 (approximately 5 miles). Also, the scale of the proposed project is not compatible with the scale and impact upon the community compared with the existing businesses located along KY 18 from Houston Road to the governmental center of Burlington.

5. The proposed project and its expected traffic impact doesn't meet the design and purpose of Burlington Pike or KY 18. The proposed project would severely impact the movement of traffic from Florence to Burlington or the County's governmental center. This road primarily serves the local population of Burlington and Oakbrook Subdivision and is not intended to predominantly serve regional traffic from I-75 and I-275 that the proposed project would draw from if the retail center were constructed.

6. The applicant has failed to determine the full impact of the project since the applicant's traffic study did not include a thorough analysis of projected residential growth and business expansion adjacent to the site and along the KY 18 corridor. This growth includes but is not limited to the existing population counts and projections of Oakbrook Subdivision, the increase in residential population in Burlington, the adjoining commercial uses in the Heritage Hill Industrial Center Subdivision and the remaining industrially zoned property located to the north. Also, with the opening of Oakbrook Road from KY 18 to Pleasant Valley Road, the traffic analysis did not take into account the anticipated traffic from the new residential development along Pleasant Valley Road.

7. The scale or size of this development requires a significant amount of off-site improvements in order to accommodate the proposed development on the 43.45 acre site. These off-site improvements include but are not limited to sanitary sewer line improvements to the Oakbrook Treatment Plant, the construction of two major access roads, and the development of a detention/retention system northwest of the 43.45 acre parcel. The development of such a detention/retention

system would drastically disrupt the natural drainage pattern as specified in the Planned Development criteria. In addition this development as proposed would require the paving of a large loading/unloading and parking area on industrially zoned property located directly behind the retail center.

8. The proposed uses and the large scale of the regionally focused retail center are not compatible with the large amount of employment or industrial zoning (e.g. 250-300 acres) that is located to the north of this site. First, the development would result in an enormous traffic impact in terms of increased traffic volume on surrounding roadways and the concern of mixing of industrial and retail traffic traveling onto KY 18. Second, there is a concern for utilizing an entrance designed for major retail use and at the same time serving a large industrial park.

9. The proposed project is not compatible with the adjoining properties to the south and east. Located to the south is a large residential community (Oakbrook—approximately 1,800 dwelling units and over 6,000 residents at full build out) within 500 feet of this project. Located to the east are approved automotive related uses. These uses were adopted as part of a zone change request prior to the adoption of the 1986 Comprehensive Plan. Unlike the applicant's submitted Concept Development Plan, these uses are not predominately regional draws and they are not developed with the same intensity as the project site. Therefore, they are compatible with the adjoining residential land uses. Automotive related use traffic is usually more dispersed during a 24 hour period, and obviously the scale of these individual uses are different in terms of community impact than the applicant's proposed project.

10. The uses that are proposed by the applicant are generally located near an interstate with an adequate road system in place to handle anticipated traffic. In addition, the underlying zone or the C-2 zoning district allows other retail and offices uses that are not normally high traffic generators. Those type of uses are presently located along the KY 18 corridor from Florence to Burlington. These uses serve the local population as intended and are indicated in the Comprehensive Plan. The submitted Concept Development Plan and proposed uses do not address the Comprehensive Plan's desire to encourage the retail, office and service related needs of the Oakbrook and Burlington populations, but rather the predominant needs of a regional population.

TRAFFIC

11. The applicant's traffic study does not fully address the development's impact on the existing roadway system.

    a. The applicant's study failed to evaluate the impact of the additional retail space in the proposed center and the out-lots, which would include an additional 240,000 square feet as stated in the applicant's Traffic Impact Analysis planned for the site. The study's conclusions were based upon Phase I of the development or just 337,000 square feet of retail use.

    b. The applicant's study does not evaluate the associated traffic from other developments in the area such as the expansion of Oakbrook Subdivision and Heritage Hill Industrial Center and other developments than have been approved. These future developments should be included in order to make the com-

plete analysis of the traffic impact on the community.

c. The applicant's study includes in Phase II traffic generated from 500,000 square feet of industrial use on the industrially zoned property to the north. This figure may be under estimated given the potential development of 250-300 acres under the current zoning regulations would allow up to 6,250,000 squ square feet of industrial use.

d. The applicant assumes that 50-60 percent of all traffic at the KY 18/I-75 interchange will use the new interchange for Mall Road. The conclusion of OKI, who prepared the study for the new ramps, is that a 30 percent reduction of traffic on KY 18 is expected. Further, the concern is that any increase in the capacity of KY 18 is protected for future growth of Boone County.

e. The applicant assumed the proposed airport road would handle 39 percent of the traffic generated by the proposed development. However, the applicant does not give an alternative if the airport road is not built, or where the 39 percent of the traffic will be routed. The Committee believes that KY 18 will be main road system for this proposed development and thus be most impacted.

The TIA analysis presented by the applicant therefore has not significantly analyzed the potential impact of the development on area roadways.

12. The applicant's Phase I conclusions of their traffic study were incomplete in terms of evaluating the impact of the entire retail development. By adding Phase II traffic, the applicant's traffic study showed that the development will reduce the LOS (level of service) of

intersections to unacceptable levels, as shown in Table 2. (see attached table) Further, these LOS calculations do not take account the additional future traffic generated by surrounding developments as discussed on Item 11.

13. The proposed design of the eastern access driveway (located off site or outside the 43.45 acre parcel) will not adequately handle the anticipated commercial traffic from the Boone Crossing development and future industrial traffic from the property immediately north of 43.45 acre parcel and Heritage Hill Industrial Center Subdivision.
14. The type of development being proposed should be located within close proximity of an interstate system and on an adequate transportation network with limited access in order to move a large amount of local and regional traffic efficiently. If this type of development was located at this site the traffic associated with this regional retail center would greatly affect the efficiency of the major thoroughfare from Florence to Burlington (KY 18) and KY 237 from the Camp Ernst area to Hebron.

CONCLUSION

The Committee would like to state that the Boone Crossings Concept Development Plan project was evaluated from a land use standpoint, which is the role of a Planning Commission. We recognize that this project would have a large economic impact on the community but then any project of this magnitude will have a large economic impact in terms of the number of jobs created and the taxes generated. The Boone County Planning Commission is charged with reviewing land use considerations, such as compatibility of the project with adjoining land uses, ade-

quacy of roads, access, utilities, signage, and public visibility for it is the land use impact which is ultimately felt by the community.

This site has many development possibilities, however, we do not believe that this is an appropriate use based on the information stated and for the reasons listed above. Further, we are of the opinion that this use could occur in Boone County if properly located.

/s/ Barry Neltner
Barry Neltner, Chairman

/s/ Larry Barnett
Larry Barnett

/s/ Fred Burch
Fred Burch

Phil Damstrom

/s/ Rector Jones
Rector Jones

/s/ Carol Smith
Carol Smith

BN:kat

APPENDIX F

COMMITTEE REPORT

TO: Boone County Planning Commission

FROM: Barry Neltner, Chairman

DATE: October 3, 1990

RE: Request of *Turfway Park Racing Association, Inc. (Owner)* for *Carroll Properties, Inc. (applicant)* for a Zoning Map Amendment on a +123.1 acre site located off both sides of the Houston Road Extension, both in Florence and in unincorporated Boone County, Kentucky. The request is to rezone the site from Office Two/Planned Development (O-2/PD), Suburban Residential Two/Planned Development (SR-2/PD), Public Facilities/Planned Development (PF/PD) and Recreation/Planned Development (R/PD), to Commercial Two/Planned Development (C-2/PD) in order to allow a mixed use office/commercial development and an entertainment and exhibition facility.

REMARKS:

We, the Committee, recommend approval of the above request based upon the following findings of fact and subject to the following conditions.

FINDINGS OF FACT

1. The existing zoning classification of the site, Office Two/Planned Development (O-2/PD), Suburban Residential Two/Planned Development (SR-2/PD), Public Facilities/Planned Development (PF/PD), and Recreation/Planned Development (R/PD), is inappro-

priate and the proposed zoning classification, Commercial Two/Planned Development (C-2/PD), is more appropriate due to the fact that the existing Houston Road Extension divides the site and, therefore, makes it less conducive for significant residential and office development as previously approved. Also, part of the Houston Road Extension is completed and represents a physical improvement already in place since the adoption of the *Houston-Donaldson Study*. In addition, some of the uses proposed, for example, the hotel use and the entertainment/mini-convention center use, are compatible with adjoining land uses and appropriate due to the presence of Turfway Park, a major recreational facility in Boone County and in Northern Kentucky.

2. The proposed uses as described on the submitted Concept Development Plan and subject to the conditions listed below generally meet the goals and objectives of Planned Development (as stated in Article 15 of the *Boone County Zoning Regulations*). In addition, some of the proposed uses will help maintain the employment character of the areas as outlined in the *Houston-Donaldson Study*. These uses are service related and are designated to protect the employment character of the area. KPC

3. The proposed uses and zoning are appropriate since the applicant has agreed to make significant roadway and utility improvements on and off the site and has agreed to phase the development. Also, the applicant has agreed to work with other property owners in the area, the Boone County Planning Commission, the City of Florence, and the Boone County Fiscal Court to help remedy the existing and forecasted traffic congestion around the I-75/

Turfway Road Interchange. These actions are in accordance with the *Houston-Donaldson Study*, which was designed to correlate Study area development with infrastructure improvements.

CONDITIONS

The applicant is being asked to agree to include these items as part of the Concept Development Plan in order to clarify the plan as presented at the August 22, 1990, Business Meeting. Further, these conditions are intended to clarify the suitable uses and development for the presented plan.

1. The applicant shall agree not to take occupancy of the proposed Bigg's building and enclosed mall until the construction of the Houston Road Extension to Donaldston Highway is completed and open to the public. The three proposed uses along Turfway Road Extension to Donaldson Highway. The applicant shall further agree not to take occupancy of any other new building until the construction of the Houston Road Extension is substantially underway.
2. The applicant shall make the necessary road improvements to the I-75 southbound exit ramp and Houston Road Extension as stated in the applicant's traffic study, application and the correspondence from the Kentucky Transportation Cabinet (dated August 22, 1990).
3. If deemed appropriate by the Boone County Planning Commission, the Kentucky Transportation Cabinet, and St. Luke West Hospital, the southern access to Parcel B shall be relocated north on the Houston Road and Turfway intersection. Such access should be located opposite from a new St. Luke West Hospital entrance.

4. The applicant will be required to share access from Parcel A to the adjoining properties to the north and south. Due to the planned shared access, the proposed ring road shall be designed to accommodate future traffic from the adjoining properties.
5. The proposed curb cut off Turfway Road serving Parcel B shall be limited to right turn in and out.
6. The proposed curb cut off the Houston Road Extension serving the major retail center on Parcel B shall be eliminated.
7. The proposed curb cut off the Houston Road Extension serving Parcel A and located closest to the northern property line shall be eliminated.
8. The applicant shall be required to negotiate with city/county officials to relocate all necessary utilities and to provide all necessary easements.
9. The applicant shall be required to pursue development of the proposed Entertainment/Mini-Convention Center facility in the first phase of development.
10. The applicant shall be required to build the proposed uses in accordance with the submitted Concept Development Plan presented at the August 22, 1990, Public Hearing with the exception of the proposed outlots on Parcel A. The outlot area shall be restricted to a maximum number of nine outlots with a total building square footage not to exceed 120,000 square feet. The proposed mix of office and commercial use will be 50% office and 50% commercial use for the outlot area.
11. The proposed Bigg's building and other associated anchor stores shall be moved approximately 50 feet northwest from the proposed location on the Concept Development Plan in order to expand the visual

buffer from I-75. Consequently, the proposed buildings will be at a minimum 150 feet from the I-75 property line.

12. All proposed buildings shall be subject to the design review procedure and standards as stated in the *Houston-Donaldson Study*. In addition, all roof equipment and loading areas from the proposed retail building along I-75 shall be sufficiently screened from public view (I-75) with the use of preserving existing trees, new landscaping plant material, decorative building materials, and decorative retaining walls. Water features shall be required along I-75 and the Houston Road Extension as part of this development. All building design shall be consistent and in harmony with the *Houston-Donaldson Study*.

BN stand within

13. ~~Generally~~, The existing trees located ~~approximately~~ 75 feet from the eastern property line shall not be removed. On the northern and southern property lines, all existing vegetation shall remain at a minimum 50 feet from each property line. Additional vegetation may be required to be preserved adjacent to the St. Luke West property at subsequent reviews. All trees to be removed on the site shall be identified on a subsequent development plan and reviewed and approved by the Boone County Planning Commission prior to any removal. The undisturbed areas shall be marked in the field and inspected by the Boone County Planning Commission.

14. The proposed development shall have at a minimum 22% green space. Each phase of the development submitted for review shall include calculations of

green space area. In general, landscaping plans for the project shall include the following:

a) Provide planting islands between every 10 to 15 spaces to avoid long rows of parked cars. The size should be a minimum of nine feet wide to allow for an adequate planting area. Each of these planting islands should provide at least one shade tree having a clear trunk height of at least six feet. For code required parking, one tree and three shrubs are to be utilized per 15 spaces.

b) Provide eight-foot wide landscape strips for every four rows of parking, or large planting islands at the ends of parking rows.

c) In addition, canopy tree plantings along the Houston Road Extension and other public streets of the proposed development shall be planted along with earthen berms as part of the application.

15. The applicant agrees to work with the City of Florence, Boone County, and area property owners and developers in arriving at a solution to the existing and forecasted traffic congestion at the Turfway Road/I-75 Interchange.

16. The applicant agrees to pay for the traffic signals which will be used to enter and exit the Bigg's site. The applicant shall negotiate with the Kentucky Transportation Cabinet and St. Luke West Hospital to place a traffic signal at the first entrance of the development off the Houston Road Extension.

This Committee recommendation upon approval by the Boone County Planning Commission is recommended to be forwarded to the City of Florence and the Boone County Fiscal Court. In addition, the Committee is recommending that the text of the *Houston-Donaldson*

Study and the *1990 Boone County Comprehensive Plan* be amended accordingly.

A copy of the Public Hearing minutes accompanies the findings and recommendation serving as a summary of the evidence and testimony presented by the proponents and opponents of this request.

/s/ Barry Neltner
Barry Neltner, Chairman

Rector Jones

/s/ Fred Burch
Fred Burch

/s/ Carol Smith
Carol Smith

/s/ Phil Damstrom
Phil Damstrom

Larry Barnett

Lawrence Collins

BN:mcb

CITY OF FLORENCE [SEAL]
Betsy R. Conrad
City Clerk

January 8, 1991

Mr. William R. Viox, Chairman
Boone County Planning Commission
P.O. Box 596
Burlington, KY 41005

Dear Mr. Viox:

Please be advised that Florence City Council declined to take action on the Planning Commission's recommendation regarding the request of **Turfway Park Racing Association, Inc. (owners) for Carroll Properties, Inc. (applicant)**, through your Resolution R-37-90. It is our understanding that the zoning map amendment stands approved as recommended in this instance.

Sincerely,

/s/ Betsy
Betsy R. Conrad

Copy: Bruce Janken, City Coordinator

Mailing Address:
P.O. Box 457 · Florence, Kentucky 41022-0457
Street Address:
7431 U.S. Highway 42 · Florence, Kentucky 41042
(606) 371-5495

APPENDIX G

AFFIDAVIT OF MIKE PHILLIPS

Comes now Mike Phillips and after being duly cautioned and sworn, states as follows:

My name is Mike Phillips, and I hold the position of Director of Real Estate of Hyper Shoppes Real Estate Company, Inc. Our organization is the real estate development arm of Biggs, a major regional retail developer. During 1989 and the early part of 1990 our company had a contract with Erpenbeck Commercial Enterprises, Inc., to purchase a parcel of land containing approximately 43 acres along Kentucky 18 in Boone County, Kentucky. That contract had a number of conditions and for various reasons set forth below, our company cancelled or terminated this contract with Erpenbeck Commercial Enterprises on or about January 11, 1990.

The parcel that was the subject of that contract had a zoning classification requiring review and approval of a concept development plan before it could be developed for a Biggs store. That approval had to come through the Boone County Fiscal Court and this approval, along with other conditions, was a requirement of the contract before our company would purchase the property. Under our contract, Erpenbeck Commercial Enterprises, Inc., was to be primarily responsible for preparation of an application with a concept development plan. Our company was responsible for some of the costs in the preparation of that plan, and before we could be obligated under our contract we had to approve that plan submitted to the Boone County zoning authorities.

In early December, 1989, the Boone County Planning Commission conducted a public hearing on the development plan submitted by Erpenbeck Commercial Enter-

prises, Inc. This plan as submitted to the Boone County authorities was not acceptable to our company and I personally informed Ray Erpenbeck of Erpenbeck Commercial Enterprises, Inc., that it was not acceptable to us. There were various problems with that plan, as we viewed it, most of which involved the transportation facilities or roadways to the site.

As a regional retailer, it is very important for us to have good access to interstate systems to allow regional customers access to our site. Erpenbeck Commercial Enterprises, Inc., had informed us that they could provide this access through a public use road through Airport owned property to the north of the Kentucky 18 location. This public use road would have close access to the interstate systems for regional customers from the north and west of the location. Without this type of access road to the site, we would not have been interested in pursuing actual purchase of the Kentucky 18 location.

Another major factor to us concerned the traffic study or design internally within the site as well as planned access from Kentucky 18. More specifically, regional traffic accessing our site from the west along Kentucky 18 did not have adequate or acceptable access to our location. Without acceptable access facilities for this eastbound regional traffic from the west, the site would not have been acceptable to us for purchase. This traffic study and design was part of the Erpenbeck submitted development plan.

Another important factor to our company was the public reaction opposing the Kentucky 18 site as a location for our company. It is our policy not to go where we are not wanted at any particular location.

Regarding internal traffic on site as reflected in the development plan submitted by Erpenbeck Commercial Enterprises, Inc., it was not designed in a way that was acceptable to our company. I informed Ray Erpenbeck, prior to its submittal, that we wanted the structure to be located along the rear property boundary line of the approximate 43 acres that was the subject of the contract. I informed Ray Erpenbeck that unless the structure was so located, we would not close or purchase the property. The importance to us is to have the structure located along the back boundary for this site so that we would have sufficient space to align parking and internal traffic flow in the way and manner our company prefers.

For all of these reasons, I informed Ray Erpenbeck that the concept development plan as submitted to the Boone County authorities was not acceptable to our company. Even if that development plan had been approved all the way through the Boone County Fiscal Court, our company would not have purchased or developed the property for a Biggs store.

In mid-February, I wrote a letter to Gerald Newton, Director of the Boone County Planning Commission, to schedule a meeting. In that letter I informed Mr. Newton that our company had terminated its contract on the Kentucky 18 property involving the Erpenbeck Commercial Enterprises proposal. My purpose in wanting to meet with Mr. Newton, as I expressed in that letter, was to discuss other locations or sites in Boone County that my company felt were more appropriate for Biggs. A meeting was scheduled for March 8, 1990, but that meeting never occurred because of the lawsuit filed by Erpenbeck Commercial Services and Enterprise VI.

After our company terminated its contract with Erpenbeck Commercial Enterprises, we received num-

erous proposals regarding other locations. However, none of these proposals came from the Boone County Planning Commission, its staff or its members. These proposals were either from property owners, real estate developers or real estate brokers from all over Southern Ohio and Kentucky. Some of these proposals came from Lexington and Louisville, Kentucky. Among the proposals sent to us was a proposal from Carroll Properties, Inc.

After meeting with Carroll Properties, Inc., and reviewing a potential site, our company entered into a contract, with several conditions, with Carroll Properties, Inc. It was only after our company decided on the Carroll Properties location that we ever met with Jerry Newton of the Boone County Planning Commission. Mr. Newton never expressed any opinion as to whether or not our project could be approved at the Carroll Properties site. He merely informed us of the procedures and what may be important factors to any review and approval for the location. Again, our company never met with Jerry Newton or the Boone County Planning Commission, its staff or members, regarding selection of any site until after we had already focused and decided on the Carroll Properties location.

The significance of the Carroll Properties location to our company was its accessibility to an interstate system. As with the Kentucky 18 site, our company anticipates that the vast majority of our regional retail customers will come from the north. We also wanted our site to have access to the west. A major consideration with the Carroll Properties contract is that we have no obligation to close or purchase until the Houston Road extension to Donaldson Highway is completed and open to the public. Another major consideration is the improvement to the

interstate highway I-75 and Donaldson Road interchange. Without this accessibility to the northerly and westerly regional retail customers, our company would not have been interested in the Carroll Properties location for a Biggs store.

Among the proposals our company received after terminating our contract with Erpenbeck Commercial Enterprises was a contact from the owner and developer of property located along Houston Road, south of its intersection with Turfway Road. That developer is Buchanan Development Corporation and the property is owned by N.K. Management, Inc. That property was not acceptable to our company for a Biggs store because of its limited accessibility to regional customers from the north. These customers would be using interstate highway I-75 and the ability of those customers from the north to access I-75 back to the north upon leaving that site is very restricted at the Turfway Road interchange with interstate highway I-75 and was not acceptable to us. Likewise, the interchange of I-75 and Kentucky 18 for the northbound traffic was viewed by our company as unacceptable and it is these two interchanges that would have to serve either the Buchanan location or the site of the Erpenbeck Commercial Services Project on Kentucky 18 west of Zig Zag Road.

CONCLUSION

To conclude, even if the Erpenbeck Commercial Services concept development plan as presented to the Boone County Planning Commission had been approved through the Boone County Fiscal Court, our company would not have purchased the property. The conditions in our contract with Erpenbeck Commercial Enter-

prises were not and would not have been met to our satisfaction in a timely manner.

Dated this 17th day of February, 1991.

/s/ MIke Phillips
Mike Phillips

State of Ohio
County of Clermont

This Affidavit was subscribed, sworn to and acknowledged before me this 18th day of February, 1991, by Mike Phillips.

/s/Betty K. Carter
NOTARY PUBLIC, State of Ohio
Betty K. Carter

My Commission Expires:
March 30, 1995

APPENDIX H

[Entered 12-30-92]
PAT GUTZEIT, CLERK
BOONE CIRCUIT/DISTRICT COURTS
BY /s/ D.C.

BOONE CIRCUIT COURT
CONSOLIDATED CIVIL ACTION
NOS. 90-CI-174 and 90-CI-175

ENTERPRISE VI, ET AL — APPELLANTS/PLAINTIFFS

VS.

BOONE COUNTY FISCAL COURT, ET AL — APPELLEES/DEFENDANTS

AND

ERPENBECK COMMERCIAL ENTERPRISES, INC., ET AL — APPELLANTS/PLAINTIFFS

VS.

BOONE COUNTY FISCAL COURT, ET AL — APPELLEES/DEFENDANTS

ORDER OVERRULING MOTION
TO ALTER, AMEND AND VACATE

* * * * * * * * * * *

Plaintiff, Erpenbeck Commercial Enterprises, Inc., having moved to alter, amend and vacate this Court's Opinion and Order entered on November 20, 1992, this Motion being heard on December 22, 1992, with said Plaintiff's counsel present (Alex Talbott) and the Court being otherwise sufficiently advised;

IT IS HEREBY ORDERED AND ADJUDGED that said Plaintiff's Motion to Alter, Amend and Vacate is overruled.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED that Plaintiff's Motion to file as part of the record the proposed Opinion and Order tendered by Defendants is overruled. For explanation, the Court states as follows:

The Opinion and Order entered on November 20, 1992, granted Defendants Summary Judgment. The Court prior to rendering that Opinion and Order requested all parties to tender proposed Opinions and Orders for the Court's review. These proposed Opinions and Orders assisted the Court to focus on the issues contained within pending motions. The Court also had before it over 250 pages of memoranda supporting these pending motions and lengthy oral argument with representation by all parties had occurred.

None of the Plaintiffs filed objections or opposed this procedure, and at the hearing on this Motion to Vacate, Mr. Talbott confirmed that he had no objection then, nor opposition now to that procedure. Counsel for Enterprise VI did not tender an Opinion and Order, and has not filed any Motion to Vacate in this case. Moreover, counsel for Enterprise VI filed no objections or opposition to submittal of proposed Opinions and Orders.

The Opinion and Order granting Defendants Summary Judgment is not a blind entry or verbatim acceptance of Defendants' tendered Opinion and Order. This Court, after becoming very familiar with the pending motions and supporting memoranda submitted by all parties and hearing the lengthy oral argument, rendered the Opinion and Order as its decision on November 20, 1992. This

Opinion and Order as entered contains several additions made by this Court and is this Court's independent decision.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED, that, while inappropriate for Plaintiffs' counsel to attach a copy of its tendered Opinion and Order to its Motion, making it improperly part of this record, this Court does not direct that it be expunged.

/s/ [Illegible]
JUDGE, BOONE CIRCUIT COURT

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